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Ensuring an Adequate Education: Opportunity to Learn, Law, and Social Science

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ENSURING AN ADEQUATE EDUCATION: OPPORTUNITY TO LEARN, LAW, AND SOCIAL SCIENCE

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Abstract: The Massachusetts Education Reform Act of 1993 and the decisions of the State's highest court interpreting the state constitution's education clause are benchmarks in efforts at law-based education reform. This article discusses the implications of legislative and judicial mandates concerning the provision of education and the extent to which these mandates fail to ensure a fair and meaningful opportunity to learn for all students. It contrasts the legal mandates with evidence from social science literature concerning the conditions that must exist in order to create appropriate learning opportunities, particularly for the most at-risk student populations. It concludes that law can play a role in creating the conditions in local schools for implementing meaningful education reform, but that the present statutory requirements are insufficient and judicial deference to the legislative branch may result in ongoing achievement deficits for the State's most vulnerable students.

Introduction

Since the middle of the twentieth century, advocates have turned to federal and state courts in efforts to provide full and fair educational opportunities for all the nation's students.[1] During the same period, state legislatures and the U.S. Congress adopted a voluminous number of statutory incentives and prescriptions concerning the provision of educational services. All these efforts were marked by an ongoing and still unresolved series of public policy disputes over the role

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[1] *See generally, e.g.*, Brown v. Bd. of Educ. (*Brown I*), 347 U.S. 483 (1954); Hancock v. Comm'r of Educ., 822 N.E.2d 1134 (Mass. 2005); McDuffy v. Sec'y of Exec. Office of Educ., 615 N.E.2d 516 (Mass. 1993); Mark G. Yudof et al., Educational Policy and the Law, at xi (3d ed., West Publ'g Co. 1992) (1974); Jay P. Heubert, *Six Law-Driven School Reforms: Developments, Lessons, and Prospects*, *in* Law & School Reform 1, 2 (Jay P. Heubert ed., 1999); Diana Pullin, *Whose Schools Are These and What Are They for? The Role of the Rule of Law in Defining Educational Opportunity in American Public Education*, *in* Handbook of Educational Policy 3 (Gregory J. Cizek ed., 1999).

of education in our society; the relationships between local communities, states, and the federal government; and the balance of powers between the legislative and judicial branches of governments.[2]

The efforts at law-based education reform have also been continuously marked by a failure to adequately marry legal claims, judicial decisions, and statutory provisions with the best available education and social science evidence and theory concerning the provision of educational opportunity.[3] Law-based education reform initiatives designed to promote equitable and adequate education fail to sufficiently address the factors necessary to provide meaningful opportunities to learn at the classroom level.[4] As a result, the utilization of law as a tool for education reform has to date failed to achieve meaningful educational attainment by *all* students.

One set of public policy commentators has suggested that the fundamental and enduring public policy disputes in education can be summarized as:

- Who should go to school?
- What are the purposes of education?
- What should be taught?
- Who should decide issues of educational policy?
- Who should pay for education?[5]

However, one question missing from efforts to resolve education policy controversies through law is: How do we ensure every student receives a fair and effective opportunity to learn? Social science research has made recent strides in identifying the models of teaching and characteristics of learning that provide the conditions necessary for effective learning opportunities at the school level. In addition, recent empirical studies have demonstrated the role that law can play

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[2] *See* Pullin, *supra* note 1, at 3–4.

[3] *See* Mary Kennedy, *Infusing Educational Decision Making with Research*, *in* Handbook of Educational Policy, *supra* note 1, at 53, 55 (noting that evidence from systematic research and evaluation has not contributed to education policy); *see also* Pullin, *supra* note 1, at 5–6, 20 (describing the proliferation of legal claims and judicial decisions in the past fifty years as representative of society's ongoing struggle to define access to educational opportunity).

[4] *See* Pullin, *supra* note 1, at 20–22 (noting that courts have struggled to define the adequacy and sufficiency of educational opportunities).

[5] Robert T. Stout et al., *Values: The "What?" of the Politics in Education*, *in* The Study of Educational Politics 6 (Jay D. Scribner & Donald H. Layton eds., 1995); *see also* Jennifer Hochschild & Nathan Scovronick, The American Dream and the Public Schools 2 (2003) (noting some of the many controversies involved in education disputes). These questions are also at the heart of educational adequacy lawsuits. *See* Pullin, *supra* note 1, at 5–7.

in promoting educational reform and attaining educational opportunity.[6] Legal attempts at education reform will succeed only to the extent that legal requirements and remedies effectively address the critical social science factors associated with improving educational opportunities for all students.

Since the landmark decision *Brown v. Board of Education* (*Brown I*),[7] education policy disputes and education law initiatives have often focused on students most at risk of failure in our schools: racial and ethnic minority children, children from low-income families and low-wealth communities, children with disabilities, and children with limited English proficiency.[8] Our system of judge-made and legislated education law has struggled with issues of educational governance, targeted funding, specialized programs, educator quality, the components of instructional programs, and institutional and individual accountability for educational attainment.[9] Yet, after over fifty years of law-based education reform, we entered a new century facing continued failure to educate all our children successfully.[10] The role of law in promoting education reform and the provision of adequate educational opportunity has had mixed success. Past lawsuits and legislation addressing the provision of educational opportunity have missed opportunities to address significantly the fundamental and highly complex issues associated with providing fair and meaningful opportunities to learn for all students, particularly those most at risk of educational failure.

I. The Courts and an Opportunity to Learn

The first significant elementary and secondary school education case in federal court was also the first case to address the issue of an opportunity to learn.[11] In *Brown I*, the U.S. Supreme Court declared:

> [E]ducation is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate

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[6] *See* discussion *infra* Part IV.

[7] Brown v. Bd. of Educ. (*Brown I*), 347 U.S. 483 (1954).

[8] *See, e.g.*, Hochschild & Scovronick, *supra* note 5, at ix–x ("[T]he great flaw in the American public school system is its systematic and pervasive denial to poor (and disproportionately non-white) children of the chance to get a good education.").

[9] *See* Pullin, *supra* note 1, at 3–7.

[10] *Id.* at 25–26.

[11] *Brown I*, 347 U.S. 483.

> our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[12]

In determining that racially separate schools were inherently unequal, the Court engaged in one of the judiciary's earliest forays into the use of social science evidence to evaluate educational legal arguments.[13] Psychological studies demonstrating pervasive perceptions of inferiority among African-American students provided social science evidence to support the Court's determination that separate schools were inherently unequal.[14]

In *Brown v. Board of Education* (*Brown II*),[15] decided a year after *Brown I*, the Court mandated that segregated schools be dismantled "with all deliberate speed."[16] In these early cases, the Supreme Court's concept of an opportunity to learn was based on a fairly simple theory: schools that educated African-American children with white children provided sufficient opportunities to learn.[17] Fifty years of political and legal struggle followed.[18] Strategies for creating equal educational opportunities for minority children grew more sophisticated and varied, from busing to building and program enhancement to affirmative ac-

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[12] *Id.* at 493.

[13] *Id.* at 494 n.11. Footnote eleven in *Brown I* refers to the works of various social scientists including *Effect of Prejudice and Discrimination on Personality Development*, by Kenneth B. Clark, and *The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion*, by Max Deutscher and Isidor Chein.

[14] *Id.* at 493–95.

[15] Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294 (1955).

[16] *Id.* at 301.

[17] *See id.* at 298; *Brown I*, 347 U.S. at 493–94 (1954). In *Brown I*, the Court stated: "Does segregation of children in public schools solely on the basis of race . . . deprive the children of the minority group of equal educational opportunities? We believe that it does." 347 U.S. at 493.

[18] *See generally* YUDOF ET AL., *supra* note 1, at 469–672 (examining extensively the law of equal educational opportunity from *Brown I* forward).

tion in teacher hiring.[19] After over fifty years of desegregation litigation, courts have mostly ended their jurisdiction over school desegregation cases, even though commentators argue that the nation's schools are becoming more segregated than ever and that the achievement gap between white and minority students persists.[20]

In addition to the more traditional types of school desegregation cases designed to end dual school systems, enrollment patterns, and staffing issues that have isolated racial minorities, civil rights advocates have also utilized the courts to challenge education practices that have a disparate impact on minority students as well as an unfair impact on all students.[21] These legal challenges have addressed not only traditional practices, such as the provision of special education or school disciplinary sanctions, but also education reform initiatives.[22]

One popular approach to education reform, adopted by both Massachusetts and the federal government, is the use of high-stakes tests to drive education reform.[23] Litigation has successfully challenged the use of some standardized achievement tests as a requirement for high school graduation.[24] In the leading case in this area, federal appellate courts ruled that state legislatures and public education officials may use tests to determine graduation status but must provide an opportunity to learn the content covered on the test, a requirement particularly important for African-American students previously forced to attend

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[19] *See id.* at 311, 496.

[20] Erica Frankenberg & Chungmei Lee, The Civil Rights Project Harvard Univ., Race in American Public Schools: Rapidly Resegregating School Districts 2 (2002), *available at* http://www.civilrightsproject.harvard.edu/research/deseg/Race_in_American_Public_Schools1.pdf; Gary Orfield et al., Dismantling Desegregation: The Quiet Reversal of *Brown v. Board of Education* 130 (1996). *See generally* Jonathan Kozol, The Shame of the Nation: The Restoration of Apartheid Schooling in America (2005).

[21] *See* Comm. on Appropriate Test Use, Nat'l Research Council, High Stakes: Testing for Tracking, Promotion, and Graduation 60–62 (Jay P. Heubert & Robert M. Hauser eds., 1999) [hereinafter High Stakes Testing]; Linda Darling-Hammond, *From "Separate but Equal" to "No Child Left Behind": The Collision of New Standards and Old Inequalities*, *in* Many Children Left Behind: How the No Child Left Behind Act Is Damaging Our Children and Our Schools 3, 7 (Deborah Meier & George Wood eds., 2004) (describing a California case in which the effect of inadequate facilities in a minority-dominated middle school was challenged).

[22] *See, e.g.*, Debra P. v. Turlington (*Debra I*), 644 F.2d 397 (5th Cir. 1981) (reviewing a challenge to a Florida school reform plan), *remanded to* 564 F. Supp. 177 (M.D. Fla. 1983), *aff'd sub nom.* Debra P. *ex rel* Irene P. v. Turlington (*Debra II*), 730 F.2d.1405 (11th Cir. 1984).

[23] *See* Mass. Gen. Laws ch. 69, § 1D (2004); High Stakes Testing, *supra* note 21, at 13–14; *see also* text *infra* accompanying notes 34–37.

[24] *See, e.g.*, *Debra I*, 644 F.2d 397; *Debra II*, 730 F.2d 1405.

segregated schools.[25] The courts based their decisions on the Equal Protection and Due Process clauses of the Fourteenth Amendment.[26] Eventually, schools were allowed to proceed with testing as a high school graduation requirement on the condition that in the time after the high-stakes testing requirements were announced and desegregation was implemented, there was evidence that the test covered curricular materials students were exposed to in high school and that remediation was provided to prepare students for taking or retaking the test.[27]

II. Legislating Learning Opportunities

Courts have recognized obligations under the Equal Protection and Due Process Clauses of the U.S. Constitution to ensure that students have an opportunity to learn.[28] However, courts have not fully articulated what kinds of actions schools must take in order to provide that opportunity.[29] Legislation at both the federal and state levels has articulated additional requirements for providing learning opportunities.[30] Examining this legislation provides insight into what legislative policymakers believe is required to afford our children opportunites to learn.

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[25] *Debra I*, 644 F.2d at 404; *Debra II*, 730 F.2d at 1407, 1414–17; *see* John R. Munich, *High-Stakes Testing: The Next Round of Finance Litigation*, 18 Me. Bar J. 202, 204 (2003) (noting that the *Debra I* decision "set the standards that still govern suits over such high-stakes exams"); *see also* High Stakes Testing, *supra* note 21, at 21 (stating that the *Debra* holdings offer "an especially clear illustration of a crucial distinction between appropriate and inappropriate test use").

[26] *Debra I*, 644 F.2d at 402; *Debra II*, 730 F.2d at 1406–07.

[27] *See Debra II*, 730 F.2d at 1409, 1415 n.15. Similar decisions on behalf of students with limited English proficiency have been based on the federal Equal Educational Opportunities Act (EEOA). 20 U.S.C. §§ 1701–1758 (2000); *see* Flores v. Arizona, 405 F. Supp. 2d 1112, 1120 (D. Ariz. 2005) (holding that state failure to provide sufficient funding and programs to English language learners denied these students an equal educational opportunity to pass the state graduation test in violation of EEOA), *vacated on other grounds sub nom.* Flores v. Rzeslawski, No. 06–15378, 2006 WL 2460741 (9th Cir. Aug. 23, 2006).

[28] *See, e.g.*, *Debra I*, 644 F.2d at 402.

[29] *See id.*

[30] *E.g.*, No Child Left Behind Act (NCLB) of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (to be codified as amended primarily in scattered sections of 20 U.S.C.); Massachusetts Education Reform Act (MERA) of 1993, Mass. Gen. Laws chs. 69–71 (2004).

A. *The No Child Left Behind Act of 2001*

The new century began with a remarkable bipartisan agreement to implement the No Child Left Behind Act of 2001 (NCLB).[31] NCLB is the largest piece of federal education legislation ever implemented, and it sought to increase federal funding to state and local educational efforts.[32] Additionally, NCLB imposes substantial conditions on receipt of federal aid by elementary and secondary schools.[33] NCLB marks a major change in the federal role in education and a widespread commitment to test-driven, standards-based education reform.[34] States must comply with NCLB mandates or lose support from the largest source of federal funding for elementary and secondary education.[35] NCLB requires that states define performance standards for districts and hold them accountable for compliance.[36] Local districts and schools must participate in annual student testing and demonstrate "adequate yearly progress" (AYP) in improving student test performance.[37] Parents are given the choice to send their child to another school if their current school is unable to meet AYP requirements.[38] NCLB also requires states to ensure that all teachers are "highly qualified," which is often determined by teacher competency testing.[39] Accountability, parental choice intended to create free-market competition, and teacher quality provisions of the statute represent an effort to improve student performance nationwide.[40]

Among the conditions placed on NCLB funding are requirements that educational programs and activities endorsed in the statute be jus-

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[31] NCLB, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (to be codified as amended primarily in scattered sections of 20 U.S.C.).

[32] Gail L. Sunderman et al., NCLB Meets School Realities, at ix (2005); James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. Rev. 932, 932 (2004).

[33] Andrew Rudalevige, *No Child Left Behind: Forging a Congressional Compromise*, *in* No Child Left Behind? 23, 26 (Paul E. Peterson & Martin R. West eds., 2003).

[34] *See* David T. Conley, Who Governs Our Schools?: Changing Roles and Responsibilities 27 (2003); Bruce S. Cooper et al., Better Policies, Better Schools 300 (2004); Frederick M. Hess & Chester E. Finn, Jr., *Introduction* to Leaving No Child Behind 2 (Frederick M. Hess & Chester E. Finn, Jr. eds., 2004); Marine S. Shaul & Harriet C. Ganson, *The No Child Left Behind Act of 2001: The Federal Government's Role in Strengthening Accountability for Student Performance*, 29 Rev. Res. Educ. 151, 152 (2005); Janet Y. Thomas & Kevin P. Brady, *The Elementary and Secondary Education Act at 40: Equity, Accountability, and the Evolving Federal Role in Public Education*, 29 Rev. Res. Educ. 51, 55 (2005).

[35] *See* 20 U.S.C.A. § 6311(g)(2) (West 2003).

[36] *Id.* § 6311(b).

[37] *Id.* § 6311(b)(2)(B), (b)(3).

[38] *Id.* § 6316(b)(1)(A), (E).

[39] *Id.* § 6319(a); *see* Thomas & Brady, *supra* note 34, at 56.

[40] *See* 20 U.S.C.A. § 6301.

tified by scientific evidence.[41] These requirements that programs and activities funded under NCLB be evidence-based represent a heightened understanding of the meaning of an opportunity to learn and the role of social science research in informing law-based educational approaches.[42]

It remains to be seen whether recent legislative and judicial initiatives will narrow the achievement gap, ensure meaningful learning opportunities, incorporate ongoing opportunities to improve the qualities and capabilities of the education professions for continuous improvement, and utilize policy tools that maximize high quality responses by educators, students, families at the ground level.

B. *Massachusetts Education Reform Act of 1993*

Prior to the enactment of NCLB, many states, on their own initiative, legislated education reforms that focused on content standards and performance benchmarks to drive local educational accountability and improvement.[43] Massachusetts offers one useful illustration of the impact of judicial and legislative activity on the provision of educational opportunity. Eight years prior to the passage of NCLB, Massachusetts began allocating billions of dollars in new funding for education pur-

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[41] *See id.* § 6316(b)(3)(A)(i) (requiring low-performing local districts that receive federal funds to develop plans for school improvement that incorporate "strategies based on scientifically based research that will strengthen the core academic subjects in the school and address the specific academic issues that caused the school [to be low-performing]"); *id.* § 6316(b)(7)(C)(iv)(I)–(II) (requiring any school failing to make AYP to take, *inter alia*, corrective action, including replacing "school staff who are relevant to the failure to make adequate yearly progress" and "providing appropriate professional development . . . that is based on scientifically based research and offers substantial promise of improving educational achievement for low-achieving students"); *id.* § 6511 (providing "financial incentives for schools to develop comprehensive school reforms, based upon scientifically based research"). The statute sets forth a definition for the term "scientifically based research" at section 7801(37). In many respects, these statutory standards parallel rules of evidence adopted by the federal courts. *See* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 587 (1993) (creating new standard that scientific evidence, to be admissible, must be relevant and reliable as determined according to a multi-part test); Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 141 (1999) (expanding application of *Daubert* standard to all expert testimony). Courts in many states have now adopted similar standards. *See, e.g.*, Canavan's Case, 733 N.E.2d 1042, 1049–50 (Mass. 2000); Commonwealth v. Lanigan, 641 N.E.2d 1342, 1349 (Mass. 1994).

[42] *See* Thomas & Brady, *supra* note 34, at 56–57.

[43] MERA, Mass. Gen. Laws chs. 69–71 (2004); High Stakes Testing, *supra* note 21, at 15; Susan H. Fuhrman, *Introduction* to From the Capitol to the Classroom: Standards-Based Reform in the States 1, 1 (Susan H. Fuhrman ed., 2001); Munich, *supra* note 25, at 202.

suant to the Massachusetts Education Reform Act of 1993 (MERA).[44] At the same time, the legislature set forth a massive set of requirements that restructured school finance, redefined the provision of education at the local level, established new rules for educator qualification and employment, and set up a standards-driven, test-based system of individual and institutional accountability.[45] This standards-driven system required, among other things, that state education officials establish curriculum frameworks for schools and institute testing to assess progress in achieving those curriculum standards.[46] Schools were required to reach benchmarks of student performance or they would be labeled underperforming and possibly reconstituted.[47] In many respects, this state legislation foreshadowed the requirements enacted later in NCLB.[48] The State's years of implementation of MERA also highlight some of the problems that will arise across the country in NCLB implementation.

Implementation of MERA and increased state funding for schools had an impact on the opportunity to learn provided to the State's students. The extent and depth of the impact became a source of public policy, educational, and legal disputes.[49] After over ten years of education reform implementation in Massachusetts, one source of evidence on the condition of the State's schools is data from the State's Massachusetts Comprehensive Assessment System (MCAS) exams.[50] While test scores have improved over time, in the spring of 2005, eleven per-

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[44] Act of June 18, 1993, ch. 71, 1993 MASS. ACTS 159 (codified as amended at MASS. GEN. LAWS chs. 69–71 (2004)).

[45] *See* MASS. GEN. LAWS chs. 69–71. The statute contained 105 sections and resulted in fifty-four new initiatives on the part of the Massachusetts Department of Education. *See* MASS. DEP'T OF EDUC., FIRST ANNUAL IMPLEMENTATION REPORT EXECUTIVE SUMMARY (1994), http://www.doe.mass.edu/edreform/1st_Imp/EXEC.SUMMARY.html.

[46] *See* HIGH STAKES TESTING, *supra* note 21, at 36, 37.

[47] *See* MASS. GEN. LAWS ch. 69, § 1J.

[48] *Compare* 20 U.S.C.A. § 6316(b)(7)–(8) (West 2003) (providing for school "restructuring" in the case of a school that fails to make AYP for a year after being identified as needing "corrective action"), *with* MASS GEN. LAWS ch. 69, §§ 1J–1K (providing that underperforming schools failing to demonstrate "significant improvement" be deemed "chronically under-performing" and reorganized or placed into receivership).

[49] *See* Hancock v. Comm'r of Educ., 822 N.E.2d 1134, 1137–39 (Mass. 2005) (describing the history of education reform litigation in Massachusetts).

[50] Caution should be exercised in relying entirely on standardized test scores as evidence of educational improvement. There are many considerations that should be taken into account, including the validity and reliability of the tests themselves, statistical anomalies concerning test scores, instructional practices, and the nature of school-level responses to external legal and policy requirements. *See generally* USES AND MISUSES OF DATA FOR EDUCATIONAL ACCOUNTABILITY AND IMPROVEMENT (Joan L. Herman & Edward H. Haertel eds., 2005).

cent of tenth graders performed at the failing level on the English Language Arts test, while fifteen percent of those students performed at the failing level on the Mathematics test, though both tests are required for high school graduation.[51] The MCAS results also indicated ongoing significant achievement gaps.[52] Limited English Proficiency (LEP) students, students with disabilities and racial and ethnic minority students continue to fall behind, while white students improve at faster rates than African-American and Hispanic students.[53]

Test performance on the MCAS continues to be low for large numbers of disadvantaged students.[54] In Boston public schools, while overall performance on the MCAS has improved, the gap in achievement between African-American and Hispanic students and other elementary students has not narrowed since the MCAS exams were first given in 1998.[55] The most recent state-wide MCAS results show that, among third graders, overall performance among all students on the reading test has remained flat for the past two years.[56]

What the Massachusetts Commissioner of Education referred to as "the usual achievement gap" persists.[57] Overall, ninety-seven percent of white students and ninety-three percent of Asian students passed the reading exam.[58] However, only seventy-four percent of LEP students, eighty-three percent of Hispanic students, eighty-five percent of students with disabilities, and eighty-seven percent of African-American students passed the test.[59] The Massachusetts Department of Education further reported:

> The performance gap was especially evident when looking at the percentage of students who scored Proficient, the top category: 39 percent of African American students scored Proficient, as did 63 percent of Asians, 32 percent of Hispanic students, 57 percent of Native Americans, 71 percent of white

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[51] Mass. Dep't of Educ., Spring 2005 MCAS Tests Summary of State Results 6 (2005), *available at* http://www.doe.mass.edu/mcas/2005/results/summary.pdf.

[52] *Id.* at 2.

[53] *Id.* LEP students are students for whom English is not their first language. *Id.* at 10.

[54] *Id.* at 1–2.

[55] Tracy Jan, *Latinos, Blacks Lag on MCAS*, Boston Globe, Jan. 19, 2006, at B1.

[56] Press Release, Mass. Dep't of Educ., 94 Percent of Third Graders Passed 2005 MCAS Reading Exam, Results Show (June 13, 2005), http://www.doe.mass.edu/news/news.asp?id=2428.

[57] *Id.*

[58] *Id.*

[59] *Id.*

> students, 37 percent of students with disabilities and 24 percent of limited English proficient students.[60]

In the mandatory report on progress that the State provided to the federal government in response to NCLB requirements, Massachusetts reported that forty-nine percent of the Commonwealth's schools have not improved test scores of black students and forty-six percent of schools did not make gains in the scores of their low-income students.[61]

In addition to MCAS scores, other sources of evidence provide information about the Commonwealth's schools following over ten years of MERA implementation.[62] For instance, performance on the Scholastic Aptitude Test (SAT), used for college admissions and financial aid determinations, reflects disparities in performance between students from low property wealth districts as opposed to those from high property wealth districts.[63] In many low-wealth districts, SAT scores have actually gone down since the implementation of MERA.[64]

The U.S. Bureau of the Census reports an ongoing gap between whites and blacks over the age of twenty-five in Massachusetts who have attained a high school diploma.[65] That gap shrank, but just barely, between 1990 and 2000.[66] In 2000, almost a quarter of the State's black population over the age of twenty-five had not even attained a high school diploma.[67] In the post-MERA environment of high-stakes testing and accountability, reports of increased dropouts from Massachusetts's schools suggest that further data regarding these gaps may look even more discouraging.[68] Clearly, the State still confronts many difficulties in its quest to provide sufficient opportunities for all students to learn.

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[60] *Id.*

[61] Megan Tench, *Schools Hit on Minority Progress*, Boston Globe, Oct. 15, 2004, at B1.

[62] Hancock *ex rel* Hancock v. Driscoll, No. 02–2978, 2004 WL 877984, at *120–25 (Mass. Super. Ct. Apr. 26, 2004) [hereinafter *Hancock* Report] (report to the Massachusetts Supreme Judicial Court by Judge Margot Botsford), *recommendation rejected by* Hancock v. Comm'r of Educ., 822 N.E.2d 1134 (Mass. 2005) (plurality opinion).

[63] *Id.* at *122.

[64] *See id.* at *123–24.

[65] Nicole S. Stoops, U.S. Census Bureau, A Half-Century of Learning: Historical Statistics on Educational Attainment in the United States, 1940 to 2000 (2006), http://www.census.gov/population/www/socdemo/education/introphct41.html (follow "Tables" hyperlink; then compare Table 7 with Table 11).

[66] *Id.*

[67] *Id.*

[68] Nat'l Ctr. for Fair & Open Testing & Coal. for Authentic Reform in Educ., *MCAS: Making the Massacusetts Dropout Crisis Worse*, MCAS Alert, Sept. 2000, at 1, *available at* http://www.fairtest.org/care/MCAS%20Alert%20Sept.html.

III. Adequacy Litigation in Massachusetts

A. *The* McDuffy *Case*

The passage of MERA in 1993 was in part a response to a decision by the State's highest court asserting that the Commonwealth had failed to meet its state constitutional obligations to educate its citizens.[69] In a clause commonly known as the Education Clause, the Massachusetts Constitution declares:

> Wisdom, and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties; and as these depend on spreading the opportunities and advantages of education in the various parts of the country, and among the different orders of the people, it shall be the duty of legislatures and magistrates, in all future periods of this commonwealth, to cherish the interests of literature and the sciences, and all . . . public schools and grammar schools in the towns . . . .[70]

Massachusetts is one of many states in which state constitutional provisions regarding elementary and secondary education have been used to challenge the inequities in the system of allocating state aid to local school districts.[71] Plaintiffs in many states have argued that these inequities in funding make it difficult for low property wealth districts to provide an opportunity to learn.[72] The use of state constitutional provisions to challenge the quality of educational opportunities was a reaction to the U.S. Supreme Court's 1973 decision *San Antonio Independent School District v. Rodriquez*, which held that there is no right to education protected under the Equal Protection Clause of the U.S. Constitution.[73] The resulting wave of state court cases asserted denials of state

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[69] *See* Mass. Gen. Laws ch. 69, § 1 (2004); McDuffy v. Sec'y of Exec. Office of Educ., 615 N.E.2d 516, 555 (Mass. 1993).

[70] Mass. Const. pt. 2, ch. V, § II.

[71] *See McDuffy*, 615 N.E.2d at 517–18; Paul A. Minorini & Stephen D. Sugarman, *Educational Adequacy in the Courts: The Promise and Problems of Moving to a New Paradigm*, *in* Equity and Adequacy in Education Finance 175, 175 (Helen F. Ladd et al. eds., 1999) [hereinafter Minorini & Sugarman, *Educational Adequacy*]; Paul A. Minorini & Stephen D. Sugarman, *School Finance Litigation in the Name of Educational Equity: Its Evolution, Impact, and Future*, *in* Equity and Adequacy in Education Finance, *supra*, at 34, 35 [hereinafter Minorini & Sugarman, *School Finance Litigation*]; Aaron J. Saiger, *Legislating Accountability: Standards, Sanctions, and School District Reform*, 46 Wm. & Mary L. Rev. 1655, 1709 (2005).

[72] *See* Minorini & Sugarman, *School Finance Litigation*, *supra* note 71, at 35.

[73] *See* 411 U.S. 1, 55 (1973).

equal protection guarantees in the provision of education as required by their respective state consitutions; though plaintiffs had mixed success in challenging these decisions.[74] The next wave of state cases asserted that state constitutional provisions on education entitled students to a particular level or quality of educational opportunity, deemed "suitable," "thorough and efficient," or "adequate" depending upon the particular language in a state's constitution.[75] Plaintiffs across the country had greater success once they turned to this type of legal claim and focused on providing an adequate education and determining how to calculate and efficiently allocate funds in support of public education.[76] In Massachusetts, the unique post-Colonial constitutional terminology established the duty to "cherish" education.[77] The first issue in the Massachusetts litigation was to determine the meaning of the term "cherish" and how that terminology related to the provision of education.[78]

In *McDuffy v. Secretary of the Executive Office of Education*, plaintiffs from low property wealth school districts argued that the state constitutional provision on education required the Commonwealth to provide every young person in the Commonwealth with equal access to an adequate education regardless of the wealth of their district.[79] Following a remarkable set of stipulations in which the State's highest educational officials and local school superintendents agreed they were not providing adequate education due to financial constraints, the Massachusetts Supreme Judicial Court determined in 1993 that there was a constitutional duty to provide education.[80] Furthermore, the court declared that the State's elected officials had failed to meet their obligations under the Massachusetts Constitution to fund and operate schools capable of providing an adequate education in order to prepare students to function successfully in society.[81]

In *McDuffy*, the court described the constitutional obligation as the duty to provide funding sufficient to prepare educated citizens.[82] The

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[74] *See* Saiger, *supra* note 71, at 1709.

[75] *See id.*

[76] Allan Odden et al., *Rethinking the Finance System for Improved Student Achievement*, *in* American Educational Governance on Trial 82, 83–84 (William Lowe Boyd & Debra Miretzky eds., 2003).

[77] *See* Mass. Const. pt. 2, ch. V, § II.

[78] *See* McDuffy v. Sec'y of Exec. Office of Educ., 615 N.E.2d 516, 523–24 (Mass. 1993).

[79] *Id.* at 523, 524.

[80] *Id.* at 553–55.

[81] *Id.* at 553–54.

[82] *Id.* at 555.

court did not establish criteria for providing an opportunity to learn, but instead described the outcomes of an adequate education:

> An educated child must possess "at least the seven following capabilities: (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable students to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and (vii) sufficient level of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market."[83]

The court deferred to the legislature to determine how to proceed.[84] The same week, the legislature passed MERA and public officials and state and local educators began implementation of the statute.[85]

B. *The* Hancock *Case*

Following six years of implementation of MERA, plaintiffs reopened the original *McDuffy* litigation. The case, recaptioned *Hancock v. Driscoll*, examined four low property wealth "focus districts," contrasting them with three high property wealth "comparison districts."[86] Plaintiffs argued that the Commonwealth was still failing to meet its state constitutional obligation to provide adequate elementary and secondary education.[87] The *Hancock* case was referred to a trial court

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[83] *McDuffy*, 615 N.E.2d at 554 (quoting Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 212 (Ky. 1989)).

[84] *Id.* at 554 n.92.

[85] Act of June 18, 1993, ch. 71, 1993 Mass. Acts 159 (codified as amended at Mass. Gen. Laws chs. 69–71 (2004)); *see supra* text accompanying Part II.B.

[86] *Hancock* Report, *supra* note 62, at *4. The four focus districts were Brockton, Lowell, Springfield, and Winchendon. *Id.* The comparison districts were Brookline, Concord/Carlisle, and Wellesley. *Id.*

[87] *Id.* at *1.

judge to report proposed findings and conclusions to the Supreme Judicial Court.[88]

1. The Proposed Findings in *Hancock*

Few would argue that judges and lawmakers in Massachusetts were not well-intending or that the MERA requirements have not had a widespread impact on schools. Yet Judge Botsford of the state trial court reported to the Supreme Judicial Court in 2004 that she found a deep and widespread failure to educate many disadvantaged students in low-wealth school districts.[89] She indicated that this failure to meet the constitutional obligations to educate was based on several factors: state funding of education, curriculum, educator quality, test scores and other indicators of educational success, and the nature of the constitutional duty to educate.[90]

a. *Funding of Education*

In 1993, the *McDuffy* court determined that inadequacies in state funding for low property wealth school districts unconstitutionally impaired access to educational opportunity for students in those districts.[91] However, the court explicitly refused to define or mandate a particular level of state funding for education, leaving the determination to the legislature.[92] When the legislature adopted MERA after the *McDuffy* decision, it adopted a new formula for allocating state educational aid.[93] Along with other educational requirements, MERA increased appropriations, which resulted in an infusion of billions of dollars in new funding for Massachusetts public elementary and secondary schools in low property wealth districts.[94] These changes were substantial and the impact on low-wealth districts was considerable.[95]

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[88] *Id.*; Hancock v. Comm'r of Educ., 822 N.E.2d 1134, 1145 (Mass. 2005).

[89] *Hancock* Report, *supra* note 62, at *143. At the time of Judge Botsford's findings, MERA had been in effect for over ten years. *Id.* at *8.

[90] *Id.* at *143, *145.

[91] *See* McDuffy v. Sec'y of Exec. Office of Educ., 615 N.E.2d 516, 552 (Mass. 1993).

[92] *Id.* at 519.

[93] *See* MASS. GEN. LAWS ch. 70 (2004); *Hancock* Report, *supra* note 62, at *5.

[94] *See Hancock* Report, *supra* note 62, at *8, *143.

[95] *See id.* at *143. For example, Judge Botsford noted that, as a result of MERA, "Winchendon's actual net school spending . . . almost tripled [between 1993 and 2003], from approximately $5.78 million to almost $14 million, while its enrollment over this period of time increased but certainly did not triple." *Id.* at *95.

However, even with the infusion of substantial new state resources into low-wealth districts as a result of MERA, Judge Botsford found that high-performing districts spend, on average, 130% of the state-mandated foundation, or minimum budget, and almost 200% of the foundation budget for teacher salaries after MERA's funding increases.[96] In contrast, between 2001 and 2003, the four focus districts were found to have spent just slightly more than 100% of the state-mandated foundation budget, and "teaching salary expenditures were generally much closer to the amount . . . allocated . . . in the formula."[97] Since the passage of MERA, pressures on the state budget due to the economic climate and a state tax cut actually resulted in overall reductions in state aid to education.[98] Some of those programs that experienced funding reductions were particularly critical to education reform efforts: class size reduction grants, support for remedial education for students failing the MCAS, and early intervention and early childhood services.[99] After MERA passed, there were no legislative adjustments of the school finance formula, which determined the minimum costs of educating students, to take into account the cost increases associated with the new curriculum, testing, and other programs added as a result of MERA.[100]

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[96] *Id.* at *123 & n.156, *127 & n.164.

[97] *See id.* at *122–23, *127 n.164.

[98] *See* Hancock v. Comm'r of Educ., 822 N.E.2d 1134, 1174 & n.3 (Mass. 2005) (Ireland, J., dissenting).

[99] *See Hancock* Report, *supra* note 62, at *127–28. Judge Botsford reported: "The high water mark of State funding for public school education programs was in FY02. The next two fiscal years saw reductions, and those in FY04 were substantial." *Id.* at *128. In addition to the reductions in state aid through the state's foundation formula for funding local schools,

> several significant grant programs were drastically cut in FY04:
>
> - Class size reduction grants . . . were eliminated entirely . . . ;
> - MCAS remediation grants were reduced from $50 million in both FY03 and FY02 to $10 million for FY04 . . . ;
> - Grants for public school preschool and other early childhood education programs were also greatly cut, for the third year in a row. Thus these grant funds went from a high of $114.5 million in FY01 to $103.4 million in FY02, to $94.6 million in FY03, and finally, down to $74.6 million in FY04;
> - Early literacy grants for early reading programs were also cut by two-thirds, from $18.3 million in FY03 to $3.8 million in FY04.

Id. at *129.

[100] *See id.* at *126.

b. *School Curriculum*

One of the primary components of the MERA reform in 1993 was the requirement that the State Board of Education, in consultation with educators and the public, write a series of curriculum frameworks to define the essential knowledge necessary for elementary and secondary students.[101] These frameworks were to address each of the content areas of mathematics, English and language arts, science, and social studies.[102] Additionally, these frameworks were to define the coverage of the MCAS examinations, though to date, only the mathematics and English/language arts tests have been fully implemented.[103] Judge Botsford found that the MCAS and its accompanying curriculum framework standards were regarded by many national education commentators as among the most ambitious in the country, and she recognized that the frameworks corresponded to the seven *McDuffy* standards.[104]

The MERA framers hoped that the formulation of curriculum frameworks, coupled with testing requirements, would cause local schools and educators to behave differently to achieve educational reform.[105] However, Judge Botsford's proposed findings in the *Hancock* case indicate that the legislature's model of reform did not necessarily work because several low-wealth districts had great difficulty implementing the curriculum frameworks.[106] For example, one low-wealth district was cited for using an outdated elementary school reading series that neither met NCLB requirements for "scientifically-based curricula" nor matched the district's curriculum goals.[107] In another example from the low property wealth district of Springfield, the local mathematics curriculum was aligned with the state curriculum frameworks, but Judge Botsford found that many math teachers in the district did not have the experience and skills to teach the inquiry and problem solving approaches mandated by those frameworks.[108]

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[101] *See* MASS. GEN. LAWS ch. 69, § 1D (2004).

[102] *Id.*

[103] *Id.*; *see Hancock* Report, *supra* note 62, at *8.

[104] *See Hancock* Report, *supra* note 62, at *17 n.37, *18–20 (citing testimony of expert witnesses at trial).

[105] *See* MASS. GEN. LAWS ch. 69, §§ 1D, 1E.

[106] *See Hancock* Report, *supra* note 62, at *23, *26, *28.

[107] *Id.* at *61; *see* discussion *supra* Part III.B.1.b.

[108] *See Hancock* Report, *supra* note 62, at *28.

c. *Educator Quality*

Both NCLB and MERA recognize that improving educator quality is an essential component of education reform. The Commonwealth's Commissioner of Education likewise described teacher quality as the critical variable in improving student achievement.[109] While both statutes set out new conditions for ensuring teacher quality,[110] researchers have also described the characteristics of teachers sufficiently prepared to educate students.[111] For example, one of the nation's preeminent researchers on teacher quality, Dr. Linda Darling-Hammond, described the criteria for judging teacher quality as the "teacher's verbal ability, level of substantive knowledge in the field he or she teaches, capacity to make content available to students at different levels, and knowledge of teaching methods."[112]

Judge Botsford also discussed the importance of teacher quality, particularly for the most high risk students.[113] She found that hiring and retaining qualified educators in low property wealth districts is especially challenging.[114] In the four low property wealth districts profiled in the *Hancock* case, a significant proportion of both teachers and administrators were not certified or licensed by the State.[115] In Winchendon, for example, one-third of the district's administrators (three of nine) were not licensed, and approximately 11% of its teachers were not licensed or were teaching out of field in the fall of 2002.[116] Also, 75% of seventh and eighth grade math teachers and approximately 20% of ninth through twelfth grade math teachers in Winchendon lacked appropriate certification in 2001.[117] In Brockton, around 10%

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[109] *Id.* at *134 (citing testimony of Dr. David Driscoll).

[110] 20 U.S.C.A. § 6601 (West 2003); Mass. Gen. Laws ch. 69, § 1J (2004).

[111] *Hancock* Report, *supra* note 62, at *134.

[112] *Id.* (citing testimony of Dr. Linda Darling-Hammond).

[113] *Id.* at *135.

[114] *Id.*

[115] *Id.* at *134. Note that educators are not technically licensed by states, but are instead certified. Certification does not consist of the exclusive ability to provide the service of educating, since states like Massachusetts do not require state credentials of any sort for individuals to teach in private schools or to engage in homeschooling. *See* Linda Darling-Hammond, *Standard Setting in Teaching: Changes in Licensing, Certification, and Assessment*, *in* Handbook of Research on Teaching 751, 751–52 (Virginia Richardson ed., 4th ed. 2001) (reviewing changing standards for teacher education, licensing, and certification); Diana Pullin, *Key Questions in Implementing Teacher Testing and Licensing*, 30 J.L. & Educ. 383, 395–97 (2001) (distinguishing teacher certification from teacher licensing).

[116] *Hancock* Report, *supra* note 62, at *134 n.184.

[117] *Id.* at *108.

of teachers and 12% of administrators were not licensed at all.[118] At the junior high school level, 50% of the junior high school math teachers were not appropriately certified in 2001.[119] By 2002 to 2003, 35% of the math teachers were still not appropriately certified in mathematics.[120] Only 32% of Lowell's middle school math teachers and only 47% of its middle school social studies teachers were certified in their respective fields.[121] In 2002, Springfield employed 2639 teachers, 12% of whom were not licensed at all.[122]

Judge Botsford highlighted the essential role qualified administrators (particularly school principals) can play in providing fair and meaningful opportunities to learn.[123] She discussed the considerable variability in school quality that can occur within a school district.[124] For example, she noted that the Springfield school district had so many low-performing schools that it was, overall, a low-performing district.[125] However, Springfield also had some of the highest-performing individual urban schools in Massachusetts.[126] She found that "[s]chool leadership and the capacity of the principal and faculty to instill a culture of student achievement were important reasons cited by the superintendent for the stark performance differences seen among these two groups of schools."[127] Clearly, Judge Botsford understood the importance of educator quality in ensuring access to meaningful educational opportunity.[128]

d. *Outcomes Measures for Education Reform*

While Judge Botsford's discussion of curriculum and educator qualifications demonstrated a more nuanced understanding of the complexities associated with providing a fair and meaningful opportunity to learn, she seemed to accept at face value the use of MCAS scores as evidence of the success of MERA's education reforms.[129] In her report, Judge Botsford determined that MCAS test score results repre-

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[118] *Id.* at *134 n.184.
[119] *Id.* at *42.
[120] *Id.*
[121] *Hancock* Report, *supra* note 62, at *62, *64.
[122] *Id.* at *90.
[123] *See id.* at *27.
[124] *See id.* (noting "enormous variation" in school quality within a particular district).
[125] *Id.* at *32.
[126] *Hancock* Report, *supra* note 62, at *27.
[127] *Id.*
[128] *See id.* at *134–35.
[129] *See id.* at *113.

sented an acceptable means for determining school and district performance, a basis for determining whether education programs were minimally adequate.[130] Overall, Judge Botsford reported that MCAS scores in the focus low-wealth districts improved from 2002 to 2003.[131] But at the same time, she used MCAS scores to demonstrate problems with the provision of adequate education in the low-wealth districts.

As one example of the use of MCAS scores to assess problems in the provision of an adequate education in the Winchendon district, Judge Botsford noted that the district's MCAS scores were among the lowest in the state.[132] Another method for assessing the results of test-based education reform is to review the rates at which students drop out of school.[133] Judge Botsford found that the dropout rates for low-wealth districts were higher than rates for the state as a whole.[134]

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[130] *Id.* Since the only MCAS tests being given at the time were in mathematics and English/language arts, there was no test score data on the other subjects covered by the curriculum frameworks. *See id.* Judge Botsford also noted that the determination of a "passing" score on MCAS was actually based upon a student attaining a score at the level of "needs improvement" rather than "proficient." *Id.*

[131] *Hancock* Report, *supra* note 62, at *113.

[132] *Id.* at *37. Judge Botsford stated:

> [T]he MCAS scores for Winchendon are very low, particularly for a non-urban system with a population that includes almost no minority or LEP students. The [English language arts] scores show very little improvement over the years. In 2003, 64% of grade 10 students scored in the Needs Improvement or Failing categories on the MCAS English language arts test, and 62% of grade 4 students did so. In math, the actual failure rate went down significantly between 1998 and 2003, but in 2003, 73% of tenth graders still scored in the combined Needs Improvement or Failing category, and the same was true of fourth graders. In 2003, 83% of the grade 8 students were in the Needs Improvement or Warning/Failing category on the science MCAS test, and 56% of fifth graders were in the same predicament. In history for eighth grade students in 2002, 95% scored in the Needs Improvement or Warning/Failing categories. As is true in the other three focus districts, there are substantial gaps between the MCAS performance of special education or low income students and that of regular education students.

Id. The Judge noted that in the previous year:

> 52.5% of Winchendon's students on the [English language arts] test and 79.8% of the students on the math test, scored in the Needs Improvement and Warning/Failing categories. These scores were 12.3 percentage points in [English language arts] and 19.4 percentage points in math more than the State average percentages for Needs Improvement and Warning/Failing.

Id. at *111.

[133] *Id.* at *113, *115–16.

[134] *Id.* at *116. Judge Botsford cited the State's own data for each district and concluded:

Though Judge Botsford recognized that some improvements could be identified, she focused on the key issue framed by the state defendants in the case.[135] State defendants asked, "Do the instructional programs provided by the district's schools in each core subject area, at each grade level, meet the educational needs of all students and result in steadily improving student achievement?"[136] Her response:

> [N]o. While it is certainly true that MCAS scores in the focus districts have improved, these four districts' scores are still much lower than the State average, not to speak of the comparison districts. As for the other criteria discussed—dropout data, retention rates, graduation rates, SAT scores, post-secondary school plans—with few exceptions, the four focus districts have not improved at all, and if one concentrates particularly on the last five years, when one would expect at least to begin seeing the impact of [M]ERA investments, there are almost no exceptions.[137]

Judge Botsford's report noted the gains in MCAS scores in low-wealth districts, yet looked at the larger picture, including state MCAS averages and graduation rates, to conclude that those students were not yet receiving an adequate education.[138]

e. *The Duty to Educate*

The report to the Supreme Judicial Court provided by Judge Botsford was extremely detailed, thoughtful, and thorough.[139] After hearing

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> The department's projected four-year dropout rates for the four focus districts are substantially higher than the annual dropout rates in the [state]. For the class of 2003, for example, the department projected a four year dropout rate (that is, ninth through twelfth grades for that class) as follows: Brockton–20%; Lowell–37%; Springfield–21%; Winchendon–17%. For the class of 2004, the four year projections are as follows: Brockton–20%; Lowell–33%; Springfield–28%; Winchendon–21%. The projections for the comparison [high-wealth] districts are much lower: for Brookline, Concord-Carlisle and Wellesley, the four year dropout rates for both 2003 and 2004 were 1% with one exception (Wellesley's projected rate for 2004 was 2%).

Id. at *116 n.143 (citations omitted).

[135] *Id.* at *117–18.

[136] *Hancock* Report, *supra* note 62, at *117.

[137] *Id.* at *118.

[138] *See id.* at *113, *118.

[139] Hancock v. Comm'r of Educ., 822 N.E.2d 1134, 1138 (Mass. 2005) (Marshall, C.J., concurring) (describing Judge Botsford's findings of fact as "thoughtful and detailed").

114 witnesses and reviewing more than 1000 exhibits, the final report she submitted spanned 318 pages.[140] The report, powerful in both its analysis and conclusions, covered indicators of both the inputs into the State's school districts and the outputs from that system. Judge Botsford focused her report on the seven capabilities identified in *McDuffy* as the benchmark against which to measure the sufficiency of the State's efforts.[141] She concluded,

> The Commonwealth, and the department, have accomplished much over the past ten years in terms of investing enormous amounts of new money in local educational programs, ensuring a far greater degree of equitable spending between rich and poor school districts, and redesigning in some fundamental ways the entire public school educational program. When one looks at the State as a whole, there have been some impressive results in terms of improvement in overall student performance. Nevertheless, the factual record establishes that the schools attended by the plaintiff children are not currently implementing the Massachusetts curriculum frameworks for all students, and are not currently equipping all students with the *McDuffy* capabilities.[142]

While MCAS scores were a primary focus, the judge reported that the problem was broader and deeper than what could be represented by test scores, extending across all the subject areas and severely impacting students from low-income families, racial and ethnic minority children, students with learning disabilities, and those with limited English proficiency.[143] The remedy Judge Botsford proposed was an order requiring the Commonwealth to follow the model set forth in the New York adequacy litigation where a public commission determines, and then the legislature provides, the costs required to permit every student the opportunity to acquire the *McDuffy* capabilities.[144]

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[140] *Id.* at 1146.

[141] *Hancock* Report, *supra* note 62, at *16; *see* McDuffy v. Sec'y of Exec. Office of Educ., 615 N.E.2d 516, 554–55 (Mass. 1993); *see also supra* text accompanying note 83.

[142] *Hancock* Report, *supra* note 62, at *143.

[143] *Id.*

[144] *See id.* at *145 (citing Campaign for Fiscal Equity, Inc. v. New York, 801 N.E.2d 326, 344–50 (N.Y. 2003)). Subsequently, New York's highest state court reaffirmed its holding that the state constitution required the State to provide a sound basic education, but held that determination of these costs rested exclusively with the legislative and executive branches unless they act unreasonably or irrationally. Campaign for Fiscal Equity, Inc. v. State, 2006 N.Y. Slip Op. 08630, 2006 WL 3344731 (N.Y. Nov. 20, 2006).

2. The Judgment in the *Hancock* Case

Upon its completion, Judge Botsford submitted her report to the Massachusetts Supreme Judicial Court for review. The court accepted the report, expressing great deference to Judge Botsford's findings.[145] A plurality of the court, however, completely rejected both her conclusions concerning the widespread failures to educate students in low-wealth districts and her recommendations.[146] The court concluded that the State's educational system had improved markedly since MERA was implemented and that, while shortcomings still existed, they did not amount to the "egregious . . . abandonment" of state responsibility found in *McDuffy*.[147] Instead, the court determined that while "serious inadequacies in public education remain . . . the Commonwealth is moving systemically to address those deficiencies and continues to make education reform a fiscal priority."[148]

The court reaffirmed the holding in *McDuffy* and ruled that the elected officials of the Commonwealth were not required to take any further steps to meet their obligations under the Massachusetts Constitution to provide an adequate education to the State's children.[149] However, in a concurring opinion, two justices indicated that they were inclined to either overturn or limit the original *McDuffy* holding.[150] Furthermore, two dissenting justices asserted that the consequence of the plurality opinion was a repudiation of the *McDuffy* holding.[151]

While the justices found that there are still significant educational problems in Massachusetts, their decision in *Hancock* relied on several critical determinations.[152] The plurality opinion embraced the enactment of MERA:

> The act . . . radically restructured the funding of public education across the Commonwealth based on uniform criteria of need, and dramatically increased the Commonwealth's man-

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[145] Hancock v. Comm'r of Educ., 822 N.E.2d 1134, 1138 (Mass. 2005). The court stated that "[Judge Botsford's] findings will stand as a compelling, instructive account of the current state of public education in Massachusetts." *Id.* at 1147.

[146] *Id.* at 1155–58.

[147] *Id.* at 1138.

[148] *Id.* at 1139.

[149] *Id.* at 1136–37.

[150] Hancock v. Comm'r of Educ., 822 N.E.2d 1134, 1159–60 (Mass. 2005) (Cowin, J., concurring) (joined by Sosman, J.). Justice Cowin described *McDuffy* as "a display of stunning judicial imagination" that should be overruled. *Id.* at 1160 (Cowin, J., concurring).

[151] *See id.* at 1171 (Greaney, J., dissenting); *id.* at 1175 (Ireland, J., dissenting).

[152] *See* discussion *infra* Part III.B.2.a–e.

> datory financial assistance to public schools. The act also established, for the first time in Massachusetts, uniform, objective performance and accountability measures for every public school student, teacher, administrator, school, and district in Massachusetts.[153]

MERA's "sweeping reach," as the court described it, and the infusion, at least in previous economic good times, of billions of new dollars of state aid to local education sufficiently indicated to the Supreme Judicial Court that the State's constitutional requirement to "cherish" education was being met.[154] MERA's system of using objective, data-driven performance assessment and accountability was persuasive evidence to the court that the State was not "acting in an arbitrary, nonresponsive, or irrational way" in meeting the constitutional obligation.[155]

Just as Judge Botsford had done, the Supreme Judicial Court's consideration of issues related to an opportunity to learn took into account issues of funding, curriculum, educator quality, and outcomes measures.[156] However, the conclusions the justices reached, and the bases for drawing these conclusions, were notably different.

a. *Funding of Education*

The Supreme Judicial Court's discussion in *Hancock* hinged on deference to the Governor and legislature to determine the allocation of financial resources.[157] This deference, coupled with the weak standard of judicial review of legislative and executive branch activities adopted by the court, help to explain the outcome in *Hancock*.[158] Justice Marshall's plurality opinion indicates that many of the justices viewed the case as primarily a debate about funding.[159] This placed the matter in the hands of the legislature because of the court's view that the legislature holds ultimate authority regarding resource allocation.[160] In the face of generally increased levels of school funding de-

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[153] *Hancock*, 822 N.E.2d at 1138 (plurality opinion).

[154] *See id.* at 1141.

[155] *Id.* at 1140, 1142.

[156] *Compare* discussion *supra* Part III.B.1.a–e (analyzing the approach of Judge Botsford), *with* discussion *infra* Part III.B.2.a–e (analyzing the approach of the Supreme Judicial Court in the *Hancock* decision).

[157] *See Hancock*, 822 N.E.2d at 1156–57.

[158] *See id.* at 1146, 1156–57.

[159] *See id.* at 1157–58; *id.* at 1164 (Cowin, J., concurring) ("[T]he controversy before us today is largely a funding debate.").

[160] *See id.* at 1156–57 (plurality opinion).

signed to minimize differences attributable to local property wealth and in the absence of any other constitutional violations, the court found that the Commonwealth was not violating the state Education Clause.[161] The magnitude of new funding allocated to local schools, as noted by Judge Botsford, was very persuasive to the court.[162] Though the court also noted drastic cuts in state funding in the two most recent budget years, the justices did not find them troubling when determining the outcome of the case.[163]

b. *School Curriculum*

The Supreme Judicial Court's determinations about funding and the standards to employ when assessing the constitutional duty to provide education allowed the court to avoid a detailed consideration of issues concerning curriculum in the schools as Judge Botsford had done.[164] However, the plurality opinion addressed curriculum and the outcomes of schooling in some detail.[165]

The court noted that the State's curriculum frameworks are of excellent quality and a reasonable representation of what students needed if they were to achieve the seven *McDuffy* capabilities.[166] Justice Marshall's plurality opinion also went so far as to endorse the curriculum frameworks as providing appropriate pedagogical approaches.[167]

c. *Educator Quality*

The Supreme Judicial Court was also very supportive of the State's efforts to enhance educator quality.[168] In particular, the court endorsed those initiatives associated with eliminating teacher tenure

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[161] *Id.* at 1152–53.

[162] *See Hancock*, 822 N.E.2d at 1147. Indeed, the court almost sarcastically noted that "[n]o one reading the judge's report can be left with any doubt that the question is not 'if' more money is needed, but how much." *Id.* at 1157.

[163] *Id.* at 1148. *But see id.* at 1174 (Ireland, J., dissenting) (expressing concern that "*McDuffy* did not envision that this constitutional duty would be subject to the vagaries of budget issues").

[164] *See* discussion *supra* Part III.B.1.b.

[165] *See Hancock*, 822 N.E.2d at 1142–43 (plurality opinion).

[166] *Id.* at 1151.

[167] *See id.* at 1142 n.10. Many educators and education researchers might contest whether the State's curriculum frameworks actually include sufficient representation of how to teach the content covered in the frameworks.

[168] *See id.* at 1144 & n.13.

and improving teacher certification requirements.[169] Consistent with the court's superlative ratings for the State's various MERA implementation efforts, the *Hancock* decision also applauded the State's teacher competency tests and credentialing regulations as "among the most rigorous teacher qualification programs in the United States."[170]

d. *Outcomes Measures for Education Reform*

The use of outcomes measures to determine whether the Commonwealth's constitutional duty regarding education is being met was first outlined in the *McDuffy* decision through that decision's description of the characteristics of an educated citizen.[171] However, in the subsequent *Hancock* decision, the Supreme Judicial Court seemed to suggest that the *McDuffy* capabilities imposed goals that were too lofty given the constitutional requirement.[172] Instead, the *Hancock* decision noted with approval the general improvement over time in MCAS examination scores.[173] The plurality opinion also firmly rejected the conclusion by two of the dissenting justices that the results of the State's efforts to improve achievement were insufficient.[174] In fact, Justice Marshall's plurality opinion seemed to assume that it is not surprising, and perhaps even inevitable, that some school districts would continue to be low performing.[175]

The metric for determining success is also worth considering. Commentators have noted elsewhere that there is an incentive for states to set the performance bar low under NCLB and state systems in order to appear to be making progress.[176] It has even been suggested that

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[169] *Id.* at 1144. Note, however, that commentators have described how the MERA requirements, as implemented, did little to change approaches concerning low-performing teachers and may, in fact, have had the reverse effect. *See e.g.*, Henry G. Stewart & Sally L. Adams, *Arbitration of Teacher Dismissals and Other Discipline Under the Education Reform Act*, 83 Mass. L. Rev. 18, 32 (1998).

[170] *Hancock*, 822 N.E.2d at 1151 (internal quotations omitted).

[171] *See supra* text accompanying note 83.

[172] The court stated: "One scholar notes of these 'capabilities' that, '[i]f this standard is taken literally, there is not a public school system in America that meets it.'" *Hancock*, 822 N.E.2d at 1153 n.29 (quoting William E. Thro, *A New Approach to State Constitutional Analysis in School Finance Litigation*, 14 J.L. & Pol. 525, 548 (1998)).

[173] *Id.* at 1150.

[174] *Id.* at 1151–52.

[175] *See id.* at 1139, 1154–56.

[176] *See* Ryan, *supra* note 32, at 934, 953–54 (arguing that NCLB creates "shaming sanctions" through the use of the label "low performing" for schools and utilizes incentives that actually work against their achievement by unintentionally encouraging states to lower their academic standards, promoting school segregation and the pushing out of poor and minority students, and discouraging good teachers from taking jobs in challenging class-

states may further lower the bar over time as NCLB's requirement for 100% proficiency for all students by 2014 nears.[177] In fact, in Massachusetts, successful completion of the MCAS test required not "proficiency," but instead only a score falling in the "needs improvement" range.[178]

e. *The Duty to Educate*

To the plurality of the court in *Hancock*, the constitutional duty to educate imposed upon the legislature and elected officials seems to consist of the duty to make a concerted effort to provide funding to local districts, coupled with directives and accountability obligations for the operation of local schools.[179] The court found that the legislature and public officials in Massachusetts engaged in a "responsive, sustained, intense legislative commitment to public education."[180] Given the court's statement of deference to the legislature and elected officials in providing education, this accolade seems to capture the court's perception of the nature of the duty imposed.[181] The plurality opinion further praises the State's efforts as revolutionary in wisdom and quality.[182]

The concurrence by Justice Cowin, joined by Justice Sosman, argued that the *McDuffy* holding read too much into the Education Clause and viewed the constitutional duty as very limited in scope, creating only broad directives with great discretion for the legislative and executive branches.[183] These justices clearly believed courts should not become involved in education policy, as they noted the importance of separation of powers and judicial restraint in these matters.[184]

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rooms). Abigail Ternstrom, member of the Massachusetts Board of Education and a strong supporter of standards-based testing, "call[ed] the goal of one hundred percent proficiency in twelve years 'ludicrous' and suggest[ed] that it [could] only be accomplished, at least in Massachusetts, by defining 'proficiency way down . . . way, way down.'" *Id.* at 945 n.64.

[177] *Id.* at 947–48.

[178] *Hancock* Report, *supra* note 62, at *9. In October of 2006, the Massachusetts Board of Education revised the score requirement; passing now requires either a score of "proficiency" on the test or a score of "needs improvement," coupled with the completion of an "Educational Proficiency Plan." 603 Mass. Code Regs. 30.03(2) (2006); Press Release, Mass. Dep't of Educ., New MCAS Regulations Require All Students to Strive for Proficiency (Oct. 24, 2006), http://www.doe.mass.edu/news/news.asp?id=3120.

[179] *Hancock*, 822 N.E.2d at 1157–58.

[180] *Id.* at 1154.

[181] *Id.* at 1157.

[182] *See id.* at 1144.

[183] *See id.* at 1159, 1160 (Cowin, J., concurring).

[184] *See Hancock*, 822 N.E.2d at 1160–61 (Cowin, J., concurring). These interpretations of the state's constitutional duty in *Hancock* follow decisions by the Supreme Judicial Court subsequent to *McDuffy* limiting the scope of the language imposing a duty to cherish edu-

Yet two justices dissented strongly from the plurality and concurring opinions in *Hancock*, characterizing the constitutional duty to cherish education more broadly and claiming that the majority of the justices, in effect, overruled *McDuffy*.[185] These two justices asserted that the plurality recast the duty to cherish education as a mere "aspiration."[186] To the dissenters, results were the key to assessing whether the duty was being met.[187] However, the dissenters also suggested that while equal outcomes on such measures as MCAS or graduation rates are not guaranteed, the constitutional obligation required that students be afforded "a reasonable opportunity to acquire an adequate education, within the meaning of *McDuffy*, in the public schools of their communities."[188] The dissenting opinions took a stance similar to that taken by Judge Botsford. As Justice Greaney stated in his dissent:

> We have then between the focus districts and the comparison districts a tale of two worlds: the focus districts beset with problems, and lacking anything that can reasonably be called an adequate education for many of their children, the comparison districts maintaining proper and adequate educational standards and moving their students toward graduation and employment with learned skills necessary to achieve in postgraduate education and function in the modern workplace.[189]

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cation. In *Doe v. Superintendent of Schools of Worcester*, decided after *McDuffy* but before *Hancock*, the court declared, "*McDuffy* should not be construed as holding that the Massachusetts Constitution guarantees each individual student the fundamental right to an education." 653 N.E.2d 1088, 1095 (Mass. 1995).

[185] *See Hancock*, 822 N.E.2d at 1165 (Greaney, J., dissenting); *id.* at 1173, 1175 (Ireland, J., dissenting).

[186] *See id.* at 1165 (Greaney, J., dissenting); *id.* at 1174 (Ireland, J., dissenting).

[187] *See id.* at 1168–69 (Greaney, J., dissenting); *id.* at 1174 (Ireland, J., dissenting).

[188] *Id.* at 1169 (Greaney, J., dissenting). Justice Greaney noted:

> As the only remaining member of the court who participated in [*McDuffy*] and as the single justice who has supervised these proceedings over several years, I write separately for the following reasons: to emphasize the nature and rule of the *McDuffy* case; to point out again the crisis that exists in the four focus districts before us; to explain how the court can and should remain involved in the proceedings without impermissibly intruding on legislative or executive prerogatives; and to express regret that the court has chosen to ignore the principles of stare decisis, thereby effectively abandoning one of its major constitutional precedents.

Id. at 1165.

[189] *Id.* at 1168.

In contrast, according to the plurality of the court, good progress was being made in Massachusetts schools.[190] These justices applauded what might be termed the legislature's early adopter approach to education reform in MERA.[191] The increased state appropriations for education, a revised system for funding local schools and the test-driven, standards-based reform and accountability requirements serve as the cornerstones for the *Hancock* adequacy determination.[192]

The *Hancock* decision marked the intersection of legislative and judge-based education reform.[193] This combination of standards-based reform and the adequacy litigation movement, described by some commentators as the "perfect storm," ended in Massachusetts with a judicial whimper.[194] The meaning and long-term ramifications of the *Hancock* decision, particularly given the current condition of education in Massachusetts, requires that education reformers assess the future direction of efforts to use litigation or legislation to improve educational opportunities. Do MERA and the *Hancock* decision set forth the standards for the operation of an educational system that will lead to the provision of fair and meaningful opportunity to learn while ameliorating the current troubling condition of education in Massachusetts? Or does social science evidence suggest that there are more potentially successful alternatives that would improve access to meaningful educational opportunities while alleviating achievement deficits for the most at-risk student populations?

IV. Social Science Research on Adequate Educational Opportunities

Two prominent education researchers, Richard Elmore and Milbrey McLaughlin, asserted in 1988 that education reform has been a continuous process in this nation.[195] They stated:

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[190] *See Hancock*, 822 N.E.2d at 1138 (plurality opinion).

[191] *See id.* In a previous decision contesting MERA implementation, the court stated that "[a]ccording to the department, the school and district accountability system it has developed is one of the first in the United States." *Hancock*, 822 N.E.2d at 1144 (quoting *Hancock* Report, *supra* note 62, at *14).

[192] *Id.* at 1138–39.

[193] *See id.* at 1157–58.

[194] *See* John Charles Boger, *Education's "Perfect Storm"? Racial Resegregation, High-Stakes Testing, and School Resource Inequities: The Case of North Carolina*, 81 N.C. L. Rev. 1375, 1375–76 (2003).

[195] Richard F. Elmore & Milbrey Wallin McLaughlin, Steady Work: Policy, Practice, and the Reform of American Education 1 (1988). Another set of prominent commentators referred to the process as a constant "tinkering" toward a utopian educational

> [R]eform can originate in any of three ways: (1) changes in professionals' view of effective practice, (2) changes in administrators' perceptions of how to manage competing demands and how to translate these demands into structure and process, and (3) changes in policymakers' views of what citizens demand that result in authoritative decisions.[196]

Looking at the outcome in *Hancock* with regards to Elmore and McLaughlin's factors, and with particular consideration of recent social science research on effective educational practice, offers insight on the conditions required to provide a fair and meaningful opportunity to learn for *all* students. While there is still much research to be done, social scientists know more than they did even in 1993 about how to educate students successfully.[197] There is also a growing body of evidence about how educators respond to external mandates like MERA and NCLB.[198] However, as Professor Elmore has noted more recently:

> [P]olicymakers have shown a willingness to ignore expert advice [in their contemporary efforts to implement education reform]. All of the problems that are present in NCLB were accurately predicted and fully defined by a series of studies commissioned by the National Research Council specifically to inform the reauthorization of [NCLB]. Sometimes the political logic of reforms undermines their essential purposes.[199]

So what does the social research say about the provision of opportunity to learn and efforts to promote education reform through the use of accountability? To what extent has the use of law-based education reform significantly changed practices in schools and enhanced opportunity to learn, particularly for the most educationally at-risk students? Have legislation and judicial decisions addressed the fundamental issues identified by social science researchers about whether our schools have the fundamental capacity to serve all stu-

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system. *See generally* David Tyack & Larry Cuban, Tinkering Towards Utopia: A Century of Public School Reform (1995).

[196] Elmore & McLaughlin, *supra* note 195, at v.

[197] *See generally* Comm. on Learning Research & Educ. Practice, Nat'l Research Council, How People Learn: Bridging Research and Practice 1–5 (M. Suzanne Donovan et al. eds., 1999) [hereinafter How People Learn] (synthesizing the literature on learning and the relationship between cognitive science research findings and the provision of appropriate curriculum and instruction).

[198] *See generally* social science literature cited throughout Part IV.

[199] Richard F. Elmore, *Details, Details, Details*, 28 N.Y.U. Rev. L. & Soc. Change 315, 317 (2003) (footnote omitted).

dents' educational needs and to provide a full and meaningful opportunity to learn?

Social science evidence has advanced since the U.S. Supreme Court's *Brown* decisions in the 1950s and has advanced even more dramatically in the past two decades.[200] We now know more about the impact of funding on the provision of educational opportunity.[201] We know more about the impact of external mandates concerning curriculum and standards.[202] We know more about how people learn.[203] We know more about how to assess what students have learned.[204]

There is now substantial evidence that an opportunity to learn is based on both a "theory of learning" and "models of teaching and schooling."[205] In addition, appropriate "instructional leadership" from administrators and teacher leaders is critical.[206] We know more about what educators need to know and be able to do.[207] Furthermore, the evidence establishes that appropriate educational opportunity for students only exists when there are appropriate and ongoing opportunities to learn for educators themselves.[208] Finally, we know more about

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[200] *See generally, e.g.*, How People Learn, *supra* note 197.

[201] *See generally, e.g.*, Equity and Adequacy in Education Finance, *supra* note 71.

[202] *See, e.g.*, discussion *infra* Part IV.B–C.

[203] *See generally, e.g.*, How People Learn, *supra* note 197.

[204] *See generally, e.g.*, Comm. on Founds. of Assessment, Nat'l Research Council, Knowing What Students Know: The Science and Design of Educational Assessment (James W. Pellegrino et al. eds., 2001) [hereinafter Knowing What Students Know]. This attempt by the National Research Council to synthesize the literature on learning and assessment concluded that current forms of large-scale assessment, such as state testing systems, fail to take into account developments in cognitive science and measurement and to provide adequate information on how to improve learning opportunities through useful models of cognition and learning. *See id.* at 2–3.

[205] *See generally id.* at 178–79; Lee S. Shulman & Judith H. Shulman, *How and What Teachers Learn: A Shifting Perspective*, 36 J. Curriculum Stud. 257 (2004). By the phrase "theory of learning," I am referring to frameworks for understanding how people learn, and by "models of teaching and schools," I am referring to devices that provide exemplars for how effective educational opportunities are provided.

[206] "Instructional leadership" describes the leadership required from educators to promote change in instructional practices. *See generally* Jo Blase & Joseph Blase, Handbook of Instructional Leadership: How Successful Principals Promote Teaching and Learning (2d ed. 2004); Linda Darling-Hammond et al., Instructional Leadership for Systemic Change (Francis M. Duffy ed., 2005); Anita Woolfolk Hoy & Wayne Kolter Hoy, Instructional Leadership: A Research-Based Guide to Learning in Schools (2003); Barbara Scott Nelson & Annette Sassi, The Effective Principal: Instructional Leadership for High-Quality Learning (2005).

[207] *See generally* Linda Darling-Hammond, The Right to Learn: A Blueprint for Creating Schools that Work (1997).

[208] *See generally* David K. Cohen & Heather C. Hill, Learning Policy: When State Education Reform Works (2001).

capacity building to promote the enhancement of opportunity to learn for all students.[209] How do these theories and models shed light on areas upon which the Massachusetts courts focused in the *Hancock* case? Finally, do law-based education reform initiatives sufficiently take the social science findings into account?

A. *Money Matters, but . . .*

There is little dispute that, at least temporarily, significant amounts of additional state money were provided to low-performing schools in Massachusetts as a result of the *McDuffy* decision and MERA.[210] There is debate in the social science literature on the extent to which increases in funding can improve educational opportunity, though most researchers conclude that funding does make a difference.[211] What is not in dispute is that *how* increased funding is utilized is as important as the presence of new financial resources for students.[212]

B. *Curriculum and Standards*

For the Massachusetts legislature and a plurality of the Supreme Judicial Court, one of the essential conditions for schools to receive increased funding was the articulation of curriculum frameworks and performance standards for students and schools.[213] The MERA provisions reflect legislative assumptions (implicitly shared by NCLB) that the declaration of state content standards and testing requirements would drive changes in curriculum and instruction at the local school level.[214] However, these provisions and the assumptions behind them are not entirely consistent with the current research literature on how

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[209] *See generally* Richard F. Elmore, School Reform from the Inside Out (2004).

[210] Federal appropriations under NCLB also increased federal funding for Massachusetts, although that funding declined somewhat after 2003 due to general decreases in the federal education budget. U.S. Dep't of Educ., Funds for State Formula-Allocated and Selected Student Aid Programs 51 (2006), *available at* http://www.ed.gov/about/overview/budget/statetables/07stbystate.pdf.

[211] *See* Minorini & Sugarman, *Educational Adequacy, supra* note 71, at 205–07; Michael A. Rebell, *Adequacy Litigations: A New Path to Equity?, in* Bringing Equity Back 291, 292–93 (Janice Petrovich & Amy Stuart Wells eds., 2005); David K. Cohen et al., *Resources, Instruction, and Research*, 25 Educ. Evaluation & Pol'y Analysis 119, 119–21 (2003). *But see* Eric A. Hanushek, *The Failure of Input-Based Schooling Policies*, 113 Econ. J. F64, F67 (2003) ("[L]ittle evidence exists to suggest that any significant changes in student outcomes have accompanied [the] growth in resources devoted to schools.").

[212] *See generally* Comm. on Educ. Fin., Nat'l Research Council, Making Money Matter 1–3 (Helen F. Ladd & Janet S. Hansen eds., 1999).

[213] *See* discussion *supra* Parts II.B, III.B.2.

[214] *See* discussion *supra* Part II.B.

education reform occurs.[215] A growing line of policy research on responses to external state or federal mandates for school reform has demonstrated that these mandates do have an impact to some extent, but they often do not provoke widespread change, particularly for at-risk students.[216] Some recent efforts to assess directly the impact of external mandates for standards-based reforms demonstrate that simply articulating standards and then holding schools accountable will not work.[217] External mandates fail to work because standards-based reform presumes rationality in schools and classrooms and in the way they respond to external mandates about either curriculum or instruction.[218] The failure of these mandates has been described in various ways. Sometimes external mandates do not succeed because autonomous local educators fail to attend to external mandates that are inconsistent with their own interests and agendas.[219] Some external mandates fail because educators do not know what to do to address the mandates successfully.[220]

However, more recent implementation research, such as the work of Professor James Spillane and others, suggests a "cognitive account."[221] Based on the premise that local officials' responses to policy will depend on how they make sense of that policy, these methods of implementation may not match the responses that policymakers desire because of these policymakers' perspective and tendency to select the

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[215] *See, e.g.*, COHEN & HILL, *supra* note 208; Richard F. Elmore, *Getting to Scale with Good Educational Practice*, 66 HARV. EDUC. REV. 1, 15–17 (1996); Jane Hannaway, *Accountability, Assessment, and Performance Issues: We've Come a Long Way . . . or Have We?*, *in* AMERICAN EDUCATIONAL GOVERNANCE ON TRIAL, *supra* note 76, at 20, 25–30; Robert L. Linn, *Accountability: Responsibility and Reasonable Expectations*, 32 EDUC. RESEARCHER 3, 3–4, 10 (2003).

[216] *See* Fuhrman, *supra* note 43, at 5–8. *See generally* SUSAN M. WILSON, CALIFORNIA DREAMING: REFORMING MATHEMATICS EDUCATION (2003). Much of this research has been financed by the U.S. Department of Education and major foundations such as the Consortium for Policy Research in Education (CPRE). For more information on the CPRE, visit http://www.cpre.org.

[217] *See, e.g.*, WILSON, *supra* note 216; Margaret E. Goertz, *Standards-Based Accountability: Horse Trade or Horse Whip?*, *in* FROM THE CAPITOL TO THE CLASSROOM, *supra* note 43, at 39, 54–55.

[218] *See, e.g.*, James P. Spillane, *Challenging Instruction for "All Students": Policy, Practitioners, and Practice*, *in* FROM THE CAPITOL TO THE CLASSROOM, *supra* note 43, at 217, 220–21, 235–38.

[219] *See* ELMORE & MCLAUGHLIN, *supra* note 195, at 48–50; JAMES P. SPILLANE, STANDARDS DEVIATION: HOW SCHOOLS MISUNDERSTAND EDUCATION POLICY 5 (2004); *see also* ARTHUR E. WISE, LEGISLATED LEARNING 47–87 (1979) (arguing that education reform policies fail because the goals of various policymaking entities conflict and because their mandates are divorced from the realities of the classroom).

[220] ELMORE, *supra* note 209.

[221] *E.g.*, SPILLANE, *supra* note 219, at 7.

cues and signals that make sense to them.[222] Policy implementation is like the "telephone game," with opportunities for the message to become garbled each time it is passed down from one level to the next.[223] What results is honest misunderstanding rather than willful attempts to adapt policy to local needs.[224]

What happens at the local school is the key to success in education reform and to determining whether or not a constitutional duty to provide meaningful learning opportunities is being met. When state policy or new ideas about teaching and learning are presented, what matters most in implementation is what local educators come to understand about their practice from the standards they are given.[225] Quite often, what state-level policymakers seek is not the same as what local educators understand as their duty under state legislation, a situation resulting in only partial implementation of state policies.[226]

Researchers have demonstrated that local educators do pay attention to what state policies mandate.[227] However, Spillane's work shows that state standards have had only limited success in implementation at the local level.[228] Some teachers *will* fundamentally change their practice, which is "proof that policy, under the right conditions, can enable teachers to make fundamental changes to their practice."[229] To Professor Spillane, the key challenge then becomes how to design policies that allow local educators to understand what should be implemented.[230]

But even the best combination of policy tools will not be sufficient in helping local educators know what or how to do what needs to be done unless they have the knowledge, skills, and dispositions to do what needs to be done and curriculum standards are appropriately defined.[231] In her study of efforts to implement curriculum reform in mathematics in California, Professor Susan Wilson writes that mathematics curricula are so insufficient and so widely diffused that they will not bring students to a high level of achieve-

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[222] *See id.*
[223] *Id.* at 8.
[224] *See* COHEN & HILL, *supra* note 208, at 71. *See generally* SPILLANE, *supra* note 219.
[225] *See* COHEN & HILL, *supra* note 208; SPILLANE, *supra* note 219, at 7–8.
[226] *See generally* COHEN & HILL, *supra* note 208; SPILLANE, *supra* note 219.
[227] *See* COHEN & HILL, *supra* note 208, at 37–51.
[228] *See* SPILLANE, *supra* note 219 at 173–74.
[229] *Id.* at 174.
[230] *See id.* at 179–82.
[231] *See* discussion *infra* Part IV.E (discussing educator qualities).

ment.[232] As a result, mathematics continues to be taught conventionally and traditionally and students are not exposed to the content knowledge or pedagogy they need for meaningful mathematics attainment.[233] She concludes that the weakness of curriculum standards causes the most harm to at-risk students from minority and low-income families, and that this debility results in student socioeconomic status becoming the critical factor in whether or not students learn mathematics.[234]

Other researchers have concluded that the curriculum and learning goals fostered by systems like the MCAS result in limiting the scope and depth of the overall curriculum. Essentially, educators narrow their instruction to teach only to the content of items covered on the state examinations because they struggle to cope in the face of high-stakes sanctions for themselves, their schools, and their students.[235]

C. *Theories of Learning and Models of Teaching*

The emerging consensus among many social scientists about efforts to improve educational opportunity also relies heavily upon recent developments in the cognitive and sociocultural sciences and research on the impact of the implementation of more recent education reform initiatives concerning classroom practices. A series of projects at the National Research Council of the National Academy of Sciences has synthesized the research on teaching, learning, and testing in the context of standards-based, high-stakes education reform initiatives.[236] These projects have compiled research and offered caution for policymaking and practice, as well as suggestions for additional research to more fully understand the impact of policy and practice on the provision of opportunities to learn.[237] The studies point out the failure of current educational practices to incorporate recent developments in

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[232] *See* WILSON, *supra* note 216.

[233] *See id.*

[234] *See id.*

[235] *See* W. JAMES POPHAM, THE TRUTH ABOUT TESTING 19–21 (2001); *see also infra* Part IV.D (discussing outcomes measures).

[236] *See generally, e.g.*, HIGH STAKES TESTING, *supra* note 21; HOW PEOPLE LEARN, *supra* note 197; KNOWING WHAT STUDENTS KNOW, *supra* note 204. The National Academy of Sciences is the congressionally chartered independent entity created to provide expert scientific advice to the government on issues of public concern. *See* 36 U.S.C. §§ 150301–150303 (2000).

[237] *See, e.g.*, HIGH STAKES TESTING, *supra* note 21, at 1–9; HOW PEOPLE LEARN, *supra* note 197, at 52–57; KNOWING WHAT STUDENTS KNOW, *supra* note 204, at 1–3.

cognitive science regarding how students learn as well as the failure of current large-scale standardized testing programs to take into account recent scientific developments in measurement, teaching, and learning.[238]

There are other efforts to synthesize social science evidence to promote educational opportunities. A research project sponsored by the Spencer Foundation, one of the nation's largest private sources of funding for education research, sought to advance understanding of the relationship between testing practices and the provision of a meaningful opportunity to learn for all students.[239] The project was a cross-disciplinary dialogue among some of the nation's most prominent educational researchers and theorists.[240] Participants in the project agreed that, historically, assessment practices have played a significant role in the amplification of inequality.[241] They concluded that breaking the cycle of inequality in the contemporary educational context requires a new way of thinking about both assessment practices and instructional approaches.[242] These researchers synthesized their individual research findings and agreed that the provision of a meaningful opportunity to learn requires a different perspective on the relationship between tests and learning and the better utilization of existing knowledge demonstrating that the unacceptable relationship between social class and educational performance can be mitigated.[243]

D. *Outcomes Measures for Education Reform*

Despite the evidence from social scientists about the conditions required to provide fair and meaningful opportunity to learn, policymakers at both the state and federal levels have invested heavily in the use of test-driven accountability systems like MCAS to improve educa-

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[238] *See generally* How People Learn, *supra* note 197, at 10–15; Knowing What Students Know, *supra* note 204, at 3–9.

[239] *See generally* Assessment, Equity, and Opportunity to Learn (Pamela Moss et al. eds., forthcoming 2007) (manuscript on file with author). For a brief project description, see Spencer Found., The "Idea of Testing" Project, http://www.spencer.org/publications/conferences/The_Idea_of_Testing_Project/project_summary_ljy.htm [hereinafter "Idea of Testing" Project].

[240] *See* "Idea of Testing" Project, *supra* note 239.

[241] *See* Assessment, Equity, and Opportunity to Learn, *supra* note 239 (manuscript at 21–22).

[242] *See id.* (manuscript at 28–30) (outlining possible approaches to conceptualizing the link between assessment and opportunity to learn).

[243] *See id.*

tion performance.[244] This investment arises in part because of a deeply ingrained belief on the part of policymakers that quantification is a useful policy tool, and that testing is a powerful and positive social policy tool for changing schools.[245] Policymakers and the public also increasingly rely on test scores as evidence of the impact of education reform initiatives.[246] Judge Botsford and the justices on the *Hancock* court certainly relied on test scores to judge the effectiveness of education reforms.[247] Yet there is a hearty debate among education researchers about the value of test-driven education reform approaches.[248] Similarly, there is a discussion among traditional civil rights advocates about the same issues.[249] However, while some civil rights advocates view test-based education reform as the best hope for improving educational opportunities for minority children, some social science commentators have stated that "beliefs and practices informed by [the use of standardized testing] have become so deeply ingrained in the American educational system that it has become difficult to see them as choices arising in particular sociocultural circumstances or to imagine that things could be otherwise."[250] Thus, some social scientists assert that the use of high-stakes testing should be reconsidered because testing designed to motivate accountability can have a negative impact on reform.[251]

One negative impact of the reliance on testing to drive education reform is that testing has diverted attention that would otherwise be paid to developing curriculum standards and building the capacity of local schools to engage in meaningful improvements.[252] Elmore believes this shift in focus occurs because,

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[244] *See* Diana Pullin, *When One Size Does Not Fit All—The Special Challenges of Accountability Testing for Students with Disabilities*, *in* Uses and Misuses of Data for Educational Accountability and Improvement, *supra* note 50, at 199.

[245] *See generally* Theodore M. Porter, Trust in Numbers: The Pursuit of Objectivity in Science and Public Life, at ix, xi (1995) (discussing the prestige and power of the use of numbers, graphs, and mathematical formulas in the policy arena).

[246] *See generally* Uses and Misuses of Data for Educational Accountability and Improvement, *supra* note 50.

[247] *See* discussion *supra* Part III.B.1, B.2.d.

[248] *See, e.g.*, High Stakes Testing, *supra* note 21, at 15–16.

[249] *See id.* at 45, 46; Testing Student Learning, Evaluating Teaching Effectiveness (Williamson M. Evers & Herbert J. Walberg eds., 2004); The Ambiguity of Teaching to the Test (William A Firestone et al. eds., 2004); Dan J. Nichols, Comment, Brown v. Board of Education *and the No Child Left Behind Act: Competing Ideologies*, BYU Educ. & L.J., 2005, at 151.

[250] Pamela A. Moss et al., *The Idea of Testing: Psychometric and Sociocultural Perspectives*, 3 Measurement 63, 66 (2005).

[251] *See generally* The Ambiguity of Teaching to the Test, *supra* note 249, at 159–60.

[252] *See* Elmore, *supra* note 199, at 316.

> when left to their own devices, . . . [accountability policies] drift toward emphasis on testing as the primary instrument, and to de-emphasize standards and capacity-building. The reasons for this are clear: testing is relatively cheap; the less sophisticated the test, the cheaper it is. . . .
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> . . . [NCLB] rewards schools and school systems essentially for gaming the test, rather than for setting high and challenging standards and using testing *and* human investment together as strategies for improving quality and performance.[253]

The testing industry's own standards of professional practice caution against overreliance on test scores when making significant determinations in education.[254] These standards require evidence that when test scores are used, they provide a valid and reliable measure of performance.[255] Robert Linn, one of the nation's preeminent experts on educational testing, concluded:

> [I]n most cases the instruments and technology have not been up to the demands that have been placed on them by high-stakes accountability. Assessment systems that are useful monitors lose much of their dependability and credibility for that purpose when high stakes are attached to them. The unintended negative effects of the high-stakes accountability uses often outweigh the intended positive effects.[256]

By shifting resources away from curriculum reform and other effective changes, high-stakes testing may do more harm that good.[257]

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[253] *Id.*

[254] *See* Am. Educ. Research Ass'n et al., Standards for Educational and Psychological Testing 146–47 (rev. ed. 1999) [hereinafter Standards for Testing]; *see also* Am. Educ. Research Ass'n, *Position Statement of the American Educational Research Association Concerning High-Stakes Testing in PreK–12 Education*, Educ. Researcher, Nov. 2000, at 24, 24–25. Standard 13.7 states: "In educational settings, a decision or characterization that will have major impact on a student should not be made on the basis of a single test score. Other relevant information should be taken into account if it will enhance the overall validity of the decision." Standards for Testing, *supra*, at 146.

[255] *See* Standards for Testing, *supra* note 254, at 9–36, 137–51; *see also* Joint Comm. on Standards for Educ. Evaluation, The Student Evaluation Standards 127–30, 155–63 (2003).

[256] Robert L. Linn, *Assessments and Accountability*, Educ. Researcher, Mar. 2000, at 4, 14; *see also* M. Gail Jones et al., The Unintended Consequences of High-Stakes Testing 167–72 (2003).

[257] In addition, there is mounting evidence that there are considerable limitations on the utility of test scores for students with disabilities or limited English proficiency. *E.g.*, Jamal Abedi, *Issues and Consequences for English Language Learners*, *in* Uses and Misuses of Data for Educational Accountability and Improvement, *supra* note 50, at 175, 193–

High-stakes testing may also have an impact on dropout rates, and those rates may then be used to punish low-performing schools. While school dropouts have long been a problem, researchers have found evidence that the pressures associated with high-stakes testing can result in more students leaving school than might otherwise be expected.[258] Yet, Both NCLB and MERA endorse sanctions for schools with low test scores or high dropout rates.[259] Commentators have referred to this process as "naming and shaming."[260] While these sanctions have been characterized as making "intuitive sense," there is little available research to support the approach.[261] The research found that sanctions have relatively limited success in promoting meaningful opportunity to learn.[262] In part, educators who regard the approach

95; Pullin, *supra* note 244, at 199–222. Other researchers have concluded that failures to implement the types of changes real reform requires causes particular harms for at-risk students. *See* Wayne E. Wright & Daniel Choi, *The Impact of Language and High-Stakes Testing Policies on Elementary School English Language Learners in Arizona*, Educ. Pol'y Analysis Archives, May 22, 2006, at 1, 4, http://epaa.asu.edu/epaa/v14n13. For example, one survey of third grade teachers revealed that a state ballot proposition limiting bilingual education, coupled with state high-stakes accountability requirements and NCLB mandates, resulted in confusion throughout the schools given the minimal guidance from state or local officials about how to provide adequate instruction to these students. *See id.* at 39–45. The result was education reform mandates that did little to improve educational opportunities for these students. *See id.* at 45–46.

[258] *See generally* Comm. on Educ. Excellence and Testing Equity, Nat'l Research Council, Understanding Dropouts: Statistics, Strategies, and High-Stakes Testing 38–45 (Alexandra Beatty et al. eds., 2001); High Stakes Testing, *supra* note 21, at 174–76; Marguerite Clarke et al., Nat'l Bd. on Educ. Testing & Pub. Policy, *High Stakes Testing and High School Completion*, NBETPP Statements, Jan. 2000, at 1, 10, *available at* http://www.bc.edu/research/nbetpp/statements/V1N3.pdf; Walt Haney, *The Myth of the Texas Miracle in Education*, Educ. Pol'y Analysis Archives, Aug. 19, 2000, http://epaa.asu.edu/epaa/v8n41; Gary G. Wehlage & Robert A. Rutter, *Dropping Out: How Much Do Schools Contribute to the Problem?*, 87 Tchrs. C. Rec. 374, 381 (1986) (listing poor test results as part of the "negative set of experiences" that lead students to leave high school).

[259] One of the stated purposes of NCLB is "holding schools, local educational agencies, and States accountable for improving the academic achievement of all students, and identifying and turning around low-performing schools that have failed to provide a high-quality education to their students." 20 U.S.C.A. § 6301(4) (West 2003). Massachusetts law allows various sanctions for chronically under-performing schools, including removal of the principal. Mass. Gen. Laws ch. 69, § 1J (2004).

[260] Heinrich Mintrop, *The Limits of Sanctions in Low-Performing Schools: A Study of Maryland and Kentucky Schools on Probation*, Educ. Pol'y Analysis Archives, Jan. 15, 2003, http://epaa.asu.edu/epaa/v11n3.

[261] *See id.*

[262] *See* Spillane, *supra* note 219 at 173–74 (noting that many teachers fail to adjust their teaching methods to align with standards-based reforms); Mintrop, *supra* note 260.

as unfair, invalid, and unrealistic are not motivated by the imposition of sanctions.[263]

E. *Educator Qualities*

Efforts to change educational opportunity by defining state-wide curriculum frameworks depend in part on the capabilities of local educators to implement the new curriculum.[264] Judge Botsford's report to the Massachusetts Supreme Judicial Court in *Hancock* noted that the Massachusetts Commissioner of Education regarded educator quality as the critical variable in education reform.[265] This perspective is supported by a growing consensus in both social science and public policy literature.[266] For many education researchers, particularly those who have studied recent attempts to implement state-mandated standards-based reforms, educator quality and the provision of an opportunity to learn for educators themselves is the factor most critical to the success of current education reform.[267]

Most of MERA's educator quality provisions focus on the credentials awarded to teachers and requirements that local districts provide professional development activities for teachers.[268] These provisions relate to what NCLB and MERA describe as criteria for determining

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[263] *See* Mintrop, *supra* note 260.

[264] *See, e.g.*, Darling-Hammond, *supra* note 207, at 229–32; Elmore, *supra* note 209.

[265] *See supra* text accompanying note 109.

[266] *See, e.g.*, Cohen & Hill, *supra* note 208; Darling-Hammond, *supra* note 207, at 69–71; Chester E. Finn, Jr. et al., The Quest for Better Teachers 1–2 (1999), *available at* http://www.edexcellence.net/doc/quest.pdf; Richard J. Murnane et al., Who Will Teach? 1–2 (1991).

[267] *See* Cohen & Hill, *supra* note 208, at 185; *see also* Elmore, *supra* note 209, at 130 ("Professional development is at the center of the practice of improvement.").

[268] In order to be certified as a "provisional educator," Massachusetts law requires the following of its teachers:

> [T]he candidate shall (1) hold a bachelor's degree in arts or sciences from an accredited college or university with a major course in the arts or sciences appropriate to the instructional field; (2) pass a test established by the board which shall consist of two parts: (A) a writing section which shall demonstrate the communication and literacy skills necessary for effective instruction and improved communication between school and parents; and (B) the subject matter knowledge for the certificate; and (3) be of sound moral character.

Mass. Gen. Laws ch. 71, § 38G (2004). Massachusetts also requires that school districts develop plans for professional development activities for teachers. *See id.* ch. 69, § 1I; *id.* ch. 71, § 38Q.

whether an individual is a "highly qualified teacher."[269] The credentialing process relies heavily upon testing and subject matter knowledge to define educator quality.[270]

However, recent social science research stresses the importance of focusing on the qualities effective educators possess rather than the paper qualifications they hold. Consistent with the intent (although not necessarily the adopted provisions) of some education reforms, cognitive scientists and researchers on policy implementation agree that good teachers possess a deep and complex level of subject matter expertise.[271] These scientists have found that expertise cannot necessarily be measured by successful passage of teacher competency tests used under MERA or NCLB.[272] Instead, social science studies describe successful educators as having certain qualities such as deep, structural understanding of subject matter content accompanied by pedagogic skills and dispositions that enable students to understand the subject matter.[273] Furthermore, research indicates that well-qualified teachers must be "*ready, willing,* and *able* to teach and to learn from [their own] teaching experiences."[274]

The Massachusetts Supreme Judicial Court's endorsement of teacher competency testing is consistent with widely embraced reform efforts, such as those articulated in NCLB.[275] However, many education researchers have soundly criticized teacher competency tests currently in use and presented questions about the defensibility of teacher certification requirements.[276]

Research indicates that state policy can change teaching practices to some extent, but the key to meaningful reform is linking clearly

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[269] *See* 20 U.S.C.A. § 7801(23) (West 2003) (defining a "highly qualified" teacher for purposes of NCLB); *see also id.* §§ 6319(a), 6613(c) (imposing responsibility on states for ensuring that local schools employ highly qualified teachers).

[270] *See supra* note 268.

[271] *See, e.g.*, How People Learn, *supra* note 197, at 2, 16; *see also* Lee S. Shulman, *Knowledge and Teaching: Foundations of the New Reform*, 57 Harv. Educ. Rev. 1, 20 (1987) (stressing the importance of "pedagogic content knowledge," described as the capacity to exercise teaching pedagogies specifically appropriate to a particular content area).

[272] *See* sources cited *supra* note 271.

[273] *See, e.g.*, How People Learn, *supra* note 197, at 2, 16; Shulman & Shulman, *supra* note 205, at 259.

[274] Shulman & Shulman, *supra* note 205, at 259 (emphasis partially omitted).

[275] *See supra* text accompanying notes 31–42.

[276] *See, e.g.*, Comm. on Assessment & Teacher Quality, Nat'l Research Council, Testing Teacher Candidates: The Role of Licensure Tests in Improving Teacher Quality 115, 121–22 (Karen J. Mitchell et al. eds., 2001); Susan L. Melnick & Diana Pullin, *Can You Take Dictation? Prescribing Teacher Quality Through Testing*, 51 J. Tchr. Educ. 262, 264 (2000); Pullin, *supra* note 115, at 384, 386.

defined curriculum and instructional content to long-term, ongoing, and in-depth professional development.[277] States must provide opportunities for educators to learn in order to be prepared in both subject content and pedagogy.[278] Only then will schools provide their students with meaningful educational opportunities.[279] When the State calls for substantial changes in local school practices, the real key to reform is a consistent approach that provides meaningful opportunities to learn for educators themselves.[280]

The use of curriculum frameworks can be helpful to educators, but only if they are accompanied by a broad range of suggested educational practices, textbook content, and thoughtful teacher analysis of students' needs.[281] State efforts to augment teaching and learning in a high-stakes testing program only work when teachers are provided with significant professional development opportunities such that they can learn how improve their teaching abilities within their respective subject areas.[282] The more learning opportunities teachers have, the more their students learn, at least as measured by state test scores.[283] One commentator concludes that it takes about ten years of sustained professional development to turn even a knowledgeable and well-qualified novice teacher into the type of seasoned professional who can attend to the individual educational needs of all students.[284] Furthermore, social science research has demonstrated the importance of leadership in schools, particularly on the part of school principals, to create a culture of reform.[285] Perhaps most important, according to the literature, is the role of the school principal in leading the improvement of instruction and learning.[286]

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[277] *See* Elmore, *supra* note 209, at 89–132.

[278] *See id.*

[279] *See id.*

[280] *See id.*

[281] *See id.*; *see also* How People Learn, *supra* note 197, at 10, 15, 19 (providing examples of how to teach based on evidence of how people learn); Comm. on Sci. Learning, Nat'l Research Council, Taking Science to School (Richard A. Duschl et al. eds., forthcoming 2007) (describing suggested practices in science education).

[282] *See* Elmore, *supra* note 209, at 89–132.

[283] *See id.*

[284] *See* Mano Singham, The Achievement Gap in U.S. Education 139 (2005).

[285] *See, e.g.*, James P. Spillane et al., *Policy Implementation and Cognition: Reframing and Refocusing Implementation Research*, 72 Rev. Educ. Res. 387 (2002); *see also* sources cited *supra* note 206 (discussing the importance of "instructional leadership").

[286] *See* Blase & Blase, *supra* note 206; Nelson & Sassi, *supra* note 206, at 7, 150.

F. *It's Capacity that Really Counts*

One legal commentator has noted that the "unaccountable school district" has long been a feature of American public education.[287] But the real locus of education reform is at the local school level; therefore, state efforts to provide education can only be meaningful if the focus is on local schools and districts.[288] Many local-level educators in schools have worked diligently to implement the new systems and meet accountability standards. However, Professor Elmore has suggested that many educators simply do not know what to do for their students since, if they did know what to do, they would do it.[289] Simply setting an external standard does not guarantee improved student performance.[290]

Researchers studying schools operating under standards-based reform mandates found the following:

> [If] state accountability policies are based on the working theory that external pressure for performance is designed to mobilize *existing* capacity, rather than to create new capacity, then it is possible that the long-term effect of accountability policies, other things being equal, could be to increase the gap in performance between high and low capacity schools. The relative absence in our case studies of evidence of deliberate, systematic efforts to influence capacity by states and localities makes this a troubling issue.[291]

These researchers concluded that policymakers suffer from a misconception if they believe that external mandates determine how schools and districts will act.[292] Schools respond differently to external accountability, depending on their initial capabilities and circumstances.[293]

Based on significant studies on the implementation of externally mandated, standards-based accountability systems, researchers have concluded that meaningful education reform requires *capacity*.[294] Ca-

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[287] Saiger, *supra* note 71, at 1662 ("[F]or a variety of historical, legal, bureaucratic, and political reasons, districts have enjoyed a long tradition of near-total autonomy.").

[288] *See* ELMORE, *supra* note 209, at 212–26.

[289] *Id.* at 216–17.

[290] *Id.* at 220–21.

[291] Richard Elmore, *Accountability and Capacity*, *in* THE NEW ACCOUNTABILITY 195, 207–08 (Martin Carnoy et al. eds., 2003).

[292] *Id.* at 195.

[293] *Id.* at 196.

[294] *See id.* at 207–09.

pacity is defined by a combination of several factors and their complex relationship, such as:

- How much teachers know about their subject area as well as their pedagogic skill in bringing students to an appropriate level of understanding (the key element of capacity).[295]
- Internal accountability of "shared norms, values, expectations, structures, and processes" working coherently to achieve ambitious goals for student learning (particularly difficult to achieve in high schools).[296]
- Leadership, not only by administrators, but throughout the school and school system.[297]
- Resources (time, money, information, materials, external support).[298]

If schools "try to respond to external pressure by doing what they are already doing at a higher level of efficiency and effectiveness[, they] typically don't produce substantial improvements in either practice or performance."[299] At present, capacities to provide full and meaningful opportunity to learn vary widely in existing schools.[300] Most frequently, according to this research, it is the low-performing schools that are the most cautious about change, the most intimidated, and the most risk-averse because of their low performance in the past.[301]

The considerable variation in capacity among schools, particularly in schools serving poor and minority children, is due in part to teacher beliefs. Many teachers in low-performing schools simply reject or ignore reforms, do not know what to do, or do not believe that they can do anything that will cause change. Teachers' low expectations for at-risk students can be overcome by implementing appropriate pedagogical methods and allowing teachers to receive the feedback that they can in fact make a difference in achievement for these students. Otherwise, teachers often narrow teaching to cover only the content of state assessment tests.[302] As one researcher concluded, "Ensuring that all students have comparable learning opportunities is

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[295] *Id.* at 197.
[296] Elmore, *supra* note 291, at 197–201.
[297] *Id.* at 203–06.
[298] *Id.* at 197.
[299] *Id.* at 208.
[300] *See id.* at 208–09.
[301] *See* Elmore, *supra* note 291, at 256.
[302] *See, e.g.*, POPHAM, *supra* note 235, at 19-21.

perhaps the most politically challenging issue that states face."[303] A focus on equalizing capacity would be a step toward providing meaningful learning opportunities.

Every student, including the most vulnerable, should have a fair and meaningful opportunity to learn an important and challenging curriculum, such as the curriculum that would lead to the *McDuffy* outcomes.[304] The most fundamental educational issue for state policymakers and judges considering a state constitution's education clause should be how to provide this opportunity to *all* students. Unfortunately, in the face of almost overwhelming evidence of continued low performance among the most at-risk students in the most resource-poor schools, the Massachusetts Supreme Judicial Court determined that the State was meeting its constitutional duty to educate.[305]

V. The Role of Law in Ensuring the Provision of a Fair and Meaningful Opportunity to Learn

Research literature confirms that, as Justice Marshall put it, the problem with the progress of education reform is that it is "painfully slow."[306] But the speed of implementation may be only part of the challenge of improving schools. Social science evidence demonstrates that the reform mandates of MERA will not thoroughly and effectively reform the delivery of educational opportunities to students most at risk of failure anytime soon, or perhaps at all. The achievement gap between white and minority children and between affluent and poor children persists.[307] Many educators have reformed their practices, but current legislative mandates for reform and inadequate financial support limit the chances to achieve the changes required. What does this say about our constitutional premise that the State has a duty to "cherish" education?

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[303] Margaret E. Goertz, *The Federal Role in an Era of Standards-Based Reform*, *in* Ctr. on Educ. Policy, The Future of the Federal Role in Elementary & Secondary Education 51, 56 (2001), *available at* http://www.cep-dc.org/pubs/futurefederal_esa/future_fed_role_main.pdf.

[304] *See supra* text accompanying notes 79–83 (describing the seven *McDuffy* capabilities).

[305] *See* Hancock v. Comm'r of Educ., 822 N.E.2d 1134, 1137–39 (Mass. 2005) (plurality opinion).

[306] *Id.* at 1154; *see also id.* at 1174 (Ireland, J., dissenting) (analogizing the slow speed of education reform to the slow speed of school desegregation).

[307] *See* Jaekyung Lee, The Civil Rights Project Harvard Univ., Tracking Achievement Gaps and Assessing the Impact of NCLB on the Gaps 56–58 (2006), *available at* http://www.civilrightsproject.harvard.edu/research/esea/nclb_naep_lee.pdf.

The MERA mandates were not based on educational theories much more sophisticated than the assumption that if you test certain content, educators will teach it and sanctions will motivate recalcitrant educators and students to improve their performance. The MERA framers seemed to assume that educators and students needed to be told what to learn and to try harder. The Massachusetts legislature showed zeal for imposing standards-driven, high-stakes accountability,[308] and the Supreme Judicial Court later accepted that approach in *Hancock*.[309] As a result, the Commonwealth has foregone the opportunity to implement deeply meaningful and effective approaches that would have a greater likelihood of ensuring a fair and meaningful opportunity to learn for all students.

Judge Botsford's comments on educator quality and the importance of the role of the school principal come closer than most court decisions, or legislation for that matter, in articulating an understanding of the characteristics needed to provide this opportunity to learn.[310] She did not have before her most of the research evidence discussed here, so many of Judge Botsford's proposed findings and conclusions fail to incorporate recent social science evidence. The plurality opinion in *Hancock* paid little attention to the conditions necessary for effective education services, instead favoring the right of the legislature to make all decisions regarding implementation of the constitutional duty to educate.[311] Judge Botsford clearly saw a role for legislators in designing education reforms and for judges in overseeing the creation and enactment of improvements by education experts and public officials.[312] On the other hand, Chief Justice Marshall, writing for a plurality of the Supreme Judicial Court, saw only controversy among education experts about how to conduct education as well as a set of value judgments about schooling in which courts should not be involved.[313]

Conclusion

The low performance of poor and minority students in Massachusetts was predictable or perhaps even inevitable, given that the reforms endorsed by social science research have not been adopted by

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[308] *See supra* note 45 and accompanying text.

[309] *See supra* notes 145–156 and accompanying text.

[310] *See supra* Part III.B.1.c.

[311] *See supra* text accompanying notes 157–160.

[312] *See supra* text accompanying notes 141–144.

[313] *See* Hancock v. Comm'r of Educ., 822 N.E.2d 1134, 1155–57 (Mass. 2005) (plurality opinion) (Marshall, C.J., concurring).

the state legislature in favor of standards-driven, high-stakes testing. As a result, the achievement gap will likely continue and may, in fact, worsen. Most efforts to use law to improve educational opportunities for at-risk students fail to consider, or constructively influence, the local-level conditions necessary for effective teaching and learning. Thus far, state legal and legislative action has neglected to implement strategies demonstrated by social science literature to provide meaningful opportunity to learn.

As more and more schools fall into the underperforming category, might the Supreme Judicial Court be persuaded that the duty to cherish education is no longer being met? Early in her plurality opinion, Chief Justice Marshall reiterated language from *McDuffy* that it is the ongoing responsibility of state officials to meet the duty to cherish education. She stated:

> Nothing I say today would insulate the Commonwealth from a successful challenge under the education clause in different circumstances. The framers recognized that "the content of the duty to educate . . . will evolve together with our society," and that the education clause must be interpreted "in accordance with the demands of modern society or it will be in constant danger of becoming atrophied and, in fact, may even lose its meaning."[314]

Perhaps in the face of ongoing performance problems, the most recent social science research will eventually persuade a future court to reconsider these matters in a new wave of school finance litigation. If it happens at all, will the next phase of adequacy lawsuits or the next revision of state or federal legislation successfully address conditions required for effective teaching and learning as described by recent social science research?

Massachusetts has foregone the opportunity to adequately address the conditions for providing a fair and meaningful opportunity to learn for students, particularly those most at risk of failure. Thus, some of the answers to the key questions of education policy enumerated at the start of this article remain unchanged, at least for the moment, in Massachusetts. The watershed year of 1993 did result in new declarations of the desired outcomes of education, the content of the curriculum, and, at least for a time, commitments to increase state

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[314] *Id.* at 1140 (quoting McDuffy v. Sec'y of Exec. Office of Educ., 615 N.E.2d 516, 555 (Mass. 1993)).

funding to low-wealth local schools. However, as to the question of who decides issues of education policy, the Massachusetts Supreme Judicial Court has clearly decided that issue now rests exclusively in the hands of the legislature. Yet in the face of substantial developments in the research evidence about how to provide meaningful opportunities to learn, the state falls far short of meeting the goal of providing the conditions and resources, or capacities, needed to educate *all* our future citizens effectively. Failure to remedy these severe educational shortcomings in light of available advances in knowledge about how to do so will surely have a detrimental impact on the social, economic, and civic future of Massachusetts. We have either reached the limits of law-based education reform or we have reached the beginning of the next phase of law-based education reform. Perhaps we will soon enter an era in which elected officials will reconsider how to structure learning conditions or where courts will determine that our collective understanding of the duty to educate has, as Chief Justice Marshall put it, indeed evolved, such that new obligations will arise that impart new meaning to our duty to cherish education.

Even if legislatures or judges can agree on a course correction in efforts to reform schools and craft approaches fully informed by what educators need to help all students achieve at high levels, some key questions of education policy remain. Educating students to high standards of achievement in meaningful content knowledge is complex, highly technical, and expensive. If we attain some level of consensus concerning the key issues of educational policy, who should pay for these endeavors? Are we all, collectively, willing to pay to educate other people's children and to educate them well? What role will law, either legislated or judge-made, play in responding to recent scientific developments and in determining the educational success of all our children?